STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANITA GROPPER	:	DECISION DTA. NO. 817858
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1995 through 1998.	:	

Petitioner Anita Gropper, 16 Lori Street, Poughkeepsie, New York 12603, filed an exception to the determination of the Administrative Law Judge issued on January 31, 2002. Petitioner appeared by James P. Constantino, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on September 25, 2002 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner has met her burden to prove that she is entitled to an economic development zone investment tax credit ("EDZ-ITC") for the tax years at issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

During the four years at issue Cross Road Press, Inc. ("Cross Road") was a C corporation incorporated under the New York State Business Corporation Law, and Maar Printing Service, Inc. ("Maar") was an S corporation incorporated under the New York State Business Corporation Law.

Petitioner is a natural person who, during the four years at issue, was a resident domiciliary of New York State.

During each of the four years at issue Cross Road timely filed New York corporation franchise tax returns (Form CT-3), Maar timely filed New York S corporation franchise tax returns or short form corporation franchise tax returns (Form CT-3S or CT-4S), and petitioner timely filed New York State resident personal income tax returns (Form IT-201). True and complete copies of the returns for each year at issue are included in the record.

Cross Road and Maar were each certified pursuant to Article 18-B of the General Municipal Law under the New York State Economic Development Zones Act for the periods beginning October 18, 1995 and November 8, 1995, respectively, through the remainder of the years at issue.

Petitioner owned and controlled all of the issued shares of stock of Maar and Cross Road during the years at issue.

Maar and Cross Road were each located and each conducted its business activities within the Poughkeepsie/Dutchess Economic Development Zone during the four years at issue.

During the years at issue Maar acquired by purchase, as that term is defined in Internal Revenue Code ("IRC") § 179(d), tangible personal property that was depreciable under IRC § 167, had a useful life of four or more years, and had its situs within the Poughkeepsie/Dutchess Economic Development Zone.

The tangible personal property described above was leased by Maar to Cross Road immediately after its acquisition.

The tangible personal property was used by Cross Road solely in the production of goods by manufacture, processing and/or assembly.

For each year at issue petitioner claimed the EDZ-ITC on Form IT-201-ATT attached to her New York State Form IT-201.

The Division of Taxation ("Division") audited petitioner's personal income tax returns for each of the years at issue. The Division disallowed the EDZ-ITC and duly issued four notices of deficiency to petitioner determining tax due in the following sums, exclusive of interest, for the years stated:

1995	$ 4,271.00
1996	2,801.00
1997	951.00
1998	2,146.00
Total	**$10,169.00**

After petitioner timely requested a conciliation conference for the Notice of Deficiency issued for tax year 1995, such conference was held, resulting in the issuance of a Conciliation

Order sustaining said notice. A petition was thereafter filed with the Division of Tax Appeals that timely protested all four notices of deficiency.

The Division timely answered the petition and thereafter sought and received the permission of the Chief Administrative Law Judge to file an amended answer. The amended answer was duly filed on or about November 21, 2000.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge explained that a shareholder of a New York S corporation may claim a pro rata share of certain allowable corporate credits, including the EDZ-ITC. One of the requirements for claiming this credit is that depreciable tangible property must be "acquired by purchase" as defined in IRC § 179(d) and be principally used by the taxpayer in the production of goods by manufacturing, processing, assembly, etc. The Administrative Law Judge noted that Tax Law § 606(j)(3) denies a taxpayer the credit with respect to any property which the taxpayer leases to any other person or corporation. The Administrative Law Judge noted parallel provisions in Tax Law § 210(12-B) concerning corporate eligibility for this credit, but focused on the provisions of Tax Law § 606(j) because petitioner claimed the tax credit as a shareholder of an S corporation.

The Administrative Law Judge observed that IRC § 179(d)(2) excludes from the definition of purchase those acquisitions where the transferor bears certain familial, corporate or other specified legal relationships with the transferee and, in particular, excludes property acquired by one component member of a controlled group from another component member of the same controlled group.

The Administrative Law Judge rejected the expansive reading of IRC § 179(d) urged by petitioner which would include the definition of controlled group contained in paragraph (7) of that section as well as the provisions of paragraph (6), clause (A), which states the rule that all component members of a controlled group are to be treated as one taxpayer. The Administrative Law Judge concluded that the Legislature intended to limit its adoption of IRC § 179(d) to the definition of the term "purchase." The Administrative Law Judge found that the Legislature included the IRC § 179(d) definition of purchase in Tax Law §§ 606(j)(2)(C) and 210(12-B)(b)(iii) to ensure that property was not acquired from a person related to the taxpayer and, in the case of a corporate taxpayer acquiring property from a corporate vendor, that they were not component members of the same controlled group. The Administrative Law Judge determined that the purpose of paragraph (7) of IRC § 179(d) was to define "controlled group," and the purpose of paragraph (6)(A) of that section was to ensure that any transfers of property between component members of a controlled group would not meet the definition of "purchase." The Administrative Law Judge concluded that the Legislature had no reason to envision the existence of petitioner's situation nor did the Legislature intend to permit a controlled group relationship to defeat the statutory prohibition of a lease arrangement with any other person or corporation when it enacted Tax Law §§ 606(j)(3) and 210(12-B)(c).

The Administrative Law Judge also considered the separate and distinct basis for the denial of the EDZ-ITC raised by the Division in its post-hearing brief concerning the requirement of Tax Law § 606(j)(2)(E)(i) that the tangible property be "principally used by the taxpayer in the production of goods by manufacturing, processing, assembling . . . ." The Division asserted that because petitioner claimed the tax credit as a pass-through from Maar, and

Maar acquired the property and immediately leased it to Cross Road who solely used the property in the production of goods by manufacture, etc., Maar was not entitled to claim the tax credit or to pass the credit through to petitioner.

The Administrative Law Judge concluded that this was a legal issue properly raised in the Division's post-hearing brief. Further, the Administrative Law Judge concluded that Maar and Cross Road are separate and distinct corporate entities despite the fact that they have common ownership and control in the person of petitioner. Inasmuch as Cross Road is the entity that principally used the tangible property in the production of goods by manufacture, and petitioner claims the EDZ-ITC as a pass-through from Maar, the Administrative Law Judge concluded that petitioner was not eligible to receive the credit due to noncompliance with Tax Law § 606(j)(2)(E)(i).

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge should have evaluated eligibility for the EDZ-ITC pursuant to Tax Law § 210(12-B)(b) and not Tax Law § 606(j). While petitioner's authority to claim the EDZ-ITC on her individual return is provided by Tax Law § 606(i), eligibility in the case of a pass-through entity (Maar) must be made at the entity level.

Petitioner asserts that Tax Law § 210(12-B)(b)(iii) allows the EDZ-ITC with respect to tangible personal property that is acquired by purchase, as defined in IRC § 179(d). Petitioner maintains that Maar acquired the property on an arm's length basis from an unrelated party. However, the property was used by Cross Road. Pursuant to IRC § 179(d)(6) and (7), petitioner alleges that component members of a controlled group are to be treated as a single taxpayer.

Petitioner maintains that these subsections are an integral part of IRC § 179(d) and the New York State Legislature fully and unconditionally adopted all of IRC § 179(d) into Tax Law § 210(12-B)(b). As a result, petitioner believes that since Maar and Cross Road are component members of a controlled group, they must be treated as a single taxpayer. Petitioner argues that as a single taxpayer, Maar and Cross Road cannot lease property to itself. Further, the use of the property by Cross Road solely in the manufacturing, processing and/or assembly of goods satisfies the requirement of Tax Law § 210(12-B)(b)(v). Therefore, petitioner asserts, IRC § 179(d) requires that once there has been a determination of a controlled group, all the requirements of Tax Law § 210(12-B)(b) must be tested on a single taxpayer basis. Thus, the use of the property by a corporation other than the acquirer will not disqualify the acquirer from the EDZ-ITC so long as both the user and the acquirer are members of the same controlled group.

The Division, in opposition, contends that because Maar rented the property to another entity and did not principally use the tangible property in the production of goods by manufacturing, processing or assembling, petitioner is not eligible for the EDZ-ITC by operation of Tax Law § 606(j)(2)(E)(i). The Division asserts further that Tax Law § 606(j)(3) renders petitioner ineligible for the pass-through of the EDZ-ITC due to the lease arrangement between Maar and Cross Road. The Division rejects petitioner's claim that the Legislature incorporated all of the IRC § 179(d) rules into the Tax Law, opining instead that the incorporation is limited strictly to the definition of the term "purchase." The Division further argues that petitioner has failed to meet her burden of proof to show clear entitlement to the credit.

OPINION

Initially, we note our agreement with petitioner's position that her entitlement to the EDZ-ITC as a pass-through from Maar depends on whether or not Maar qualifies for this credit in the first instance. Therefore, it is necessary to look to the provisions of Tax Law § 210(12-B)(b) rather than Tax Law § 606(j). However, as the provisions of Tax Law § 210(12-B)(b) relevant to our inquiry are identical to those contained in Tax Law § 606(j), the Administrative Law Judge's findings and conclusions are equally applicable to either section.

Petitioner insists that, pursuant to IRC § 179(d)(6), both Maar and Cross Road must be "treated as a single taxpayer" for purposes of considering the purchase of the depreciable tangible personal property at issue as well as its use. If petitioner is correct, the purchase by Maar of the subject property must be considered a purchase by Cross Road and the use by Cross Road of the property actually purchased by Maar is tantamount to a use by Maar, thus qualifying Maar to claim the EDZ-ITC. We do not accept petitioner's position.

While we agree with petitioner's argument that Cross Road and Maar fit the definition of "component members of a controlled group," as that term is defined by IRC § 1563, we note that IRC § 179(d)(6) provides:

> DOLLAR LIMITATION OF CONTROLLED GROUP.- *For purposes of subsection (b) of this section* -
>
> (A) all component members of a controlled group shall be treated as one taxpayer . . . (emphasis added).

Subsection (b) of IRC § 179 provides limitations on the aggregate cost which may be taken into account when treating the cost of IRC § 179 property as an expense. It is for this purpose alone that all component members of a controlled group are treated as a single taxpayer as provided in

subsection (6). Section 179(d)(6) is not a blanket direction to treat component members of a controlled group as a single taxpayer for all purposes in analyzing the applicability of IRC § 179. Similarly, IRC § 179(d)(6)(A) does not affect the definition of "purchase" provided in IRC § 179(d)(2) and incorporated into Tax Law § 210(12-B)(b)(iii) nor is there any indication that the Legislature intended IRC § 179(d)(6)(A) to apply to the "use" test set forth in Tax Law § 210(12-B)(b)(v).

In the present matter, the qualifying purchase of tangible personal property was made by Maar from an unrelated third party. Had such property been principally used by Maar for one or more of the purposes enumerated in Tax Law § 210(12-B)(b)(v), Maar would have been eligible for the credit at issue and it would have been passed through to petitioner. However, on acquisition, Maar immediately leased said property to Cross Road. This action caused Maar to lose eligibility for the EDZ-ITC based on its purchase of the tangible personal property pursuant to Tax Law § 210(12-B)(c), which specifically provides that a taxpayer shall not be allowed a credit with respect to tangible personal property "which it leases to any other person or corporation." Cross Road was such an "other" corporation and, notwithstanding petitioner's argument to the contrary, we find no authority to treat Maar and Cross Road as a single taxpayer and thereby ignore the existence of a lease of the subject property between them.

It may seem a harsh result that the credit has been lost to petitioner in this manner. However, it is well established that: "[i]t is the form chosen by the taxpayer which is controlling and the fact that a taxpayer could have chosen a different form which would have had different tax consequences does not convert a taxable transaction into a nontaxable one" (***Matter of Chanry Communications, Ltd.,*** Tax Appeals Tribunal, March 7, 1991, ***confirmed Matter of***

Henry v. Wetzler, 183 AD2d 57, 588 NYS2d 924, ***affd*** 82 NY2d 859, 609 NYS2d 160, ***cert denied*** 511 US 1126, 128 L Ed 2d 863, ***citing Sverdlow v. Bates,*** 283 App Div 487, 129 NYS2d 88, 91). This rationale applies equally with reference to eligibility for exemptions or credits.

As a result, we find that the Administrative Law Judge completely and adequately addressed the issues presented to him. Thus, we affirm the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Anita Gropper is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Anita Gropper is denied; and

4. The Notices of Deficiency, L-015626791, L-017364586, L-017364590 and L-017364591, are sustained.

DATED: Troy, New York
December 19, 2002

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner