STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANITA GROPPER	:	**DETERMINATION** 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, a/k/a Anita Gropper-Westin, 16 Lori Street, Poughkeepsie, New York 12603, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1995 through 1998.

On February 14, 2001 and February 22, 2001, respectively, petitioner, by her representative, John D. Bertolozzi, Jr., CPA, and the Division of Taxation by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel) consented to have this controversy determined upon the submission of documents and a stipulation of facts without a hearing. All briefs were to be submitted by July 31, 2001, which date began the six-month period for the issuance of this determination. After due consideration of the entire record, Gary R. Palmer, Administrative Law Judge, renders the following determination.

***ISSUE*S**

I. 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.

II. Whether the Division of Tax Appeals may consider a ground for relief that was raised by the Division of Taxation for the first time in its brief.

FINDINGS OF FACT

1. Petitioner and the Division of Taxation ("Division") entered into a Stipulation of Facts which has been substantially adopted as Findings of Fact "2" through "14." Attached to the Stipulation of Facts as exhibits "A" through "K" are certain documents referenced in the Stipulation and submitted by the joint agreement of the parties.

2. 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.

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

4. 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.

5. 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.

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

7. 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.

8. 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.

9. The tangible personal property described in Finding of Fact "8" was leased by Maar to Cross Road immediately after its acquisition.

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

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

12. The 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**

13. 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.

14. The Division of Taxation 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.

SUMMARY OF THE POSITIONS OF THE PARTIES

15. Petitioner maintains that the New York State Legislature fully and unconditionally incorporated all of the special rules of IRC § 179(d) into Tax Law §§ 210 (12-B) (b)(iii) and 606(j)(2), including paragraph (6)(A) of section 179(d) which reads, "all component members of a controlled group shall be treated as one taxpayer . . . " and paragraph (7) which reads, "[f]or purposes of paragraphs (2) and (6), the term 'controlled group' has the meaning assigned to it by section 1563(a) . . . ." Petitioner reasons that because her wholly-owned corporations, Maar and Cross Road, meet the IRC § 1563(a) definition of a brother-sister controlled group, it follows that her corporations must be treated as one taxpayer, and the fact that Maar leases the tangible property to Cross Road must be disregarded because a controlled group cannot lease equipment to itself. Therefore the lease arrangement between Maar and Cross Road does not serve to bar petitioner's eligibility for the EDZ-ITC.

16. The Division contends 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 asserts that because Maar does not principally use the tangible property in the production of goods by manufacturing, processing or assembling, etc.,

petitioner is not eligible for the pass through of the EDZ-ITC by operation of Tax Law § 606(j)(2)(E)(i).

CONCLUSIONS OF LAW

A. Tax Law § 606 (i)(1)(A) permits a shareholder of a New York S corporation to be treated as the taxpayer with respect to her pro rata share of the credit base of such corporation respecting certain enumerated credit provisions, including the EDZ-ITC of subdivision 12-B of Tax Law § 210. Tax Law § 606(j)(1) allows a credit of eight percent of the cost or other basis for Federal income tax purposes of tangible personal property or other tangible property to be computed as therein provided. Paragraph (2) of section 606(j) allows the credit where the tangible property is (A) depreciable in accordance with IRC § 167, (B) has a useful life of four or more years, (C) is acquired by purchase as defined in IRC § 179(d), (D) has a situs in an Economic Development Zone designated under Article 18-B of the General Municipal Law, and (E) is (i) principally used by the taxpayer in the production of goods by manufacturing, processing, assembly, etc. Tax Law § 606(j)(3) denies the credit with respect to any property which the taxpayer leases to any other person or corporation subject to exceptions which are not pertinent here. Similarly, paragraph (c) of Tax Law § 210(12-B) denies the EDZ-ITC respecting tangible property which the taxpayer leases to any other person or corporation. It does not appear to matter, for purposes of this analysis, whether the focus of this discussion is on subdivision (12-B) of Tax Law § 210 or the parallel provisions of Tax Law § 606(j). Because petitioner claims the tax credit as a shareholder of an S corporation, the focus will be on section 606(j) and related provisions.

B. The first task is to discern the intent of the Legislature when it chose to adopt the IRC § 179(d) definition of the term "purchase" as one of the criteria for determining the eligibility of tangible property for EDZ-ITC treatment (Tax Law § 606[j][2]). IRC § 179(d) reads, in part, as follows:

> (d) DEFINITIONS AND SPECIAL RULES
>
> * * *
>
> (2) PURCHASE DEFINED.- For purposes of paragraph (1), the term "purchase" means any acquisition of property, but only if -
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> * * *
>
> (B) the property is not acquired by one component member of a controlled group from another component member of the same controlled group . . . .
>
> (6) 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 . . . .
>
> (7) CONTROLLED GROUP DEFINED.- For purposes of paragraphs (2) and (6), the term "controlled group" has the meaning assigned to it by section 1563(a) . . . .

IRC § 1563(a) reads, in part, as follows:

> (a) CONTROLLED GROUP OF CORPORATIONS.- For purposes of this part, the term "controlled group of corporations" means any group of-
>
> * * *
>
> (2) BROTHER-SISTER CONTROLLED GROUP.- Two or more corporations if 5 or fewer persons who are individuals . . . own . . . stock possessing-

> (A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation . . . .

Paragraph (2) of section 179(d) defines purchase as any acquisition of property, but excludes 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 Division urges a halt to the analysis of section 179(d) at this point because Tax Law § 606(j)(2) incorporates only the definition of purchase found in paragraph (2), clauses (A) and (B) of section 179(d). In contrast, petitioner requests a more expansive reading of section 179(d) to include paragraph (7), where the definition of controlled group is found, and paragraph (6), clause (A), which states the rule that all component members of a controlled group are to be treated as one taxpayer.

Petitioner contends in her briefs, and the Division agrees in its brief, that because the statutory language is clear and unambiguous, the question presented is one of pure statutory reading and analysis, dependent only on the accurate apprehension of legislative intent (***see, Kurcsics v. Merchants Mutual Insurance Co.,*** 49 NY2d 451, 426 NYS2d 454, 458). In such matters the task at hand is reduced to giving effect to the intent of the Legislature and the plain meaning of the words it used (***Matter of 1605 Book Center, Inc. v. Tax Appeals Tribunal***, 83 NY2d 240, 609 NYS2d 144, ***cert denied*** 513 US 811, 130 L Ed 2d 19).

The clear legislative objective in selecting the IRC § 179(d) definition of purchase was to avoid abuse by ensuring that property acquired by the taxpayer was not acquired from a person related to the taxpayer (IRC § 179[d][2][A]) 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 (IRC § 179[d][2][B]).[1] This is why the Legislature adopted the IRC § 179(d) definition of purchase in Tax Law §§ 606(j)(2)(C) and 210 (12-B)(b)(iii). Because IRC § 179(d)(2)(B) employed the term "controlled group" in its definition of "purchase," the purpose of paragraph (7) of section 179(d) was simply to define "controlled group," and the purpose of paragraph (6)(A) was to ensure that any transfers of property between component members of a controlled group would not meet the definition of "purchase" and, as a consequence, would not qualify for EDZ-ITC treatment. The Legislature, when it adopted the section 179(d) definition of "purchase," had no reason to envision the existence of an EDZ-ITC claimant with two wholly-owned corporations meeting the IRC definition of controlled group and dealing with one another as lessor and lessee with respect to the tangible property acquired. The factual scenario of Maar and Cross Road was simply not within the contemplation of the Legislature. Nor was it the intention of the Legislature to permit the existence of the 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 plain meaning of the unambiguous language used in these statutes clearly limits the Legislature's purpose in its adoption of IRC § 179(d) to the definition of the term "purchase." The more expansive reading of section 179(d) urged by petitioner is rejected as being outside the scope of legislative intent.

C. A separate and distinct basis for the denial of the EDZ-ITC was raised by the Division in its brief having to do with the requirement of Tax Law § 606(j)(2)(E)(i) that the tangible

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[1]This finding of legislative intent is consistent with the argument of petitioner's attorney in his November 22, 1999 letter to the Conciliation Conferee which is attached to the Stipulation of Facts as Exhibit "H."

property be "principally used by the taxpayer in the production of goods by manufacturing, processing, assembling . . . ." It is the Division's position that because petitioner claimed the tax credit as a pass through from Maar, and it was Maar's role to acquire the property and immediately lease it to Cross Road who solely used the property in the production of goods by manufacture, etc. (Findings of Fact "9" and "10"), it follows that Maar is not entitled to claim the tax credit or to pass the credit through to petitioner.

The threshold question to be addressed is whether the Division of Tax Appeals may consider a new issue raised for the first time in the Division's brief. The Tax Appeals Tribunal has uniformly held that new legal issues, as opposed to factual issues, may be raised on exception (***Matter of Chuckrow***, Tax Appeals Tribunal, July 1, 1993). The new question addressed in the Division's brief is clearly a legal question that, in view of petitioner's opportunity to respond in her reply brief, was properly raised in this instance.

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 (***see, Custer v. Quaker***, 41 AD2d 448, 344 NYS2d 606). On their franchise tax returns, which are part of the record, Cross Road reports its principal business activity as "manufacturing," while Maar reports its principal business activity as "rental/services." 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, petitioner is not eligible to receive the credit due to noncompliance with Tax Law § 606(j)(2)(E)(i).

D. The petition of Anita Gropper is denied and the four notices of deficiency are, in all respects, sustained.

DATED: Troy, New York
January 31, 2002

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE