

**New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau**

TSB-A-86 (19) C
Corporation Tax
September 10, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C860620B

On June 20, 1986, a Petition for Advisory Opinion was received from Enzo Biochem, Inc., 325 Hudson Street, New York, New York 10013.

ISSUES

The issues raised are whether, for purposes of the franchise tax on business corporations imposed by Article 9-A of the Tax Law, tangible personal property used by Petitioner in its business qualifies for the research and development credit provided by section 210.18 of the Tax Law or the investment tax credit provided by section 210.12 of the Tax Law and the employment incentive credit provided by section 210.12-A of the Tax Law.

FACTS

Petitioner is engaged in laboratory research to develop various products for human disease diagnosis, genetic analysis and prenatal diagnosis, cancer detection and prognosis, plant pathogen identification and animal disease diagnosis. Petitioner currently manufactures DNA-based human infectious disease diagnostic probe kits for sale to the health care market.

All of the equipment listed below under the category of "Equipment Used to Conduct Research" is used by Petitioner to actually perform such laboratory research. All of the equipment listed below under the category of "Production Equipment" is principally used by Petitioner in the manufacture of its diagnostic kits. All of the equipment listed below is depreciable pursuant to section 167 of the Internal Revenue Code or recovery property with respect to which a deduction is allowable under section 168 of the Internal Revenue Code; has a useful life of four years or more; was acquired by purchase as defined in section 179(d) of the Internal Revenue Code and has a situs in New York State.

Research and Development Equipment

Petitioner uses the following equipment in its research laboratory:

Equipment Used to Conduct Research

H₂O Baths - Maintains materials at specific temperatures
Centrifuges (Ultra, Low Speed, Micro, Rotors, Table Top) - Separate materials
Shakers (Incubator, Table Top, H₂O) - Vibrates liquid materials
Incubators (CO₂, Dry Air) - Grows test cells
Sterilizers - Prevents contamination of research materials
Programmable Dispenser - Measures research materials
Ovens (Drying, vacuum) - Dries research materials
Washing Manifolds for Elisa Plates - Monitors materials during testing

Elisa Plates - Monitors materials during testing
Gamma Counter - Monitors materials during testing
Scintillation Counter - Monitors materials during testing
Fermentors - Grows cells for analysis
Spectrophotometers with Accessories - Measures research materials
Darkroom tanks - Monitors materials during research
Darkroom Processor and Accessories - Monitors materials during research
Gel Equipment (Vertical, Horizontal) - Monitors materials during research
Electro Blot Transfer - Monitors materials during research
Gel Dryer - Monitors materials during research
Gene Machine - Separates different size materials
Gene Machine Power Supply - Separates different size materials
Gene Machine Pump - Separates different size materials
Gene Machine Fraction Column - Separates different size materials
Temperature Calculator - Monitors research materials
pH Meters - Monitors research materials
Lyophilizers - Removes water from research material
Balances (Top Loader, Analytical) Weight research material
Microscopes (Light, Fluorescent, Dual Viewer, Phase) - Inspects result of research
Cameras - Inspects results of research
Vacuum Pumps - Filters research materials
Elisa Readers - Monitors materials during research
Fluorimeter - Monitors materials during research
Pipetmen - Measures materials during research
Klett Colorimetric - Measures materials during research
Spec 20 - Measures materials during research
HPLC - Measures materials during research
Trans Illuminator - Measures materials during research
Distillation Apparatus - Measures materials during research
Gene Synthesizer - Measures materials during research
Sequencing Apparatus - Measures materials during research
Col. Chromatography Equipment - Measures materials during research
Gradient Makers - Measures materials during research
Vortexes - Mixes solutions during tests
Hot Plate Stirrers - Mixes solutions during tests
Liquid Nitrogen Tanks - Maintains low temperatures during tests
Microwave Ovens - Heats testing solutions
Seal-a-Meals - Packages research materials
Glove Boxes - Used in manipulation of research materials
Hoods (Tissue, Fume, Bench Top) - Removes contaminants from air in research laboratory

Equipment Used to Store Research Materials

Crushed Ice Machines
Refrigerators
Freezers

Safety Equipment

Eye Washes
Safety Showers

Manufacturing Equipment

Petitioner uses the following manufacturing equipment in the manufacture of its diagnostic kits:

Production Equipment

Sonicators - Shatters raw materials
H₂O Baths - Maintains materials at specific temperatures
Centrifuges (Ultra, Low Speed, Micro, Rotors, Table Top) - Separates materials
Shakers (Incubator, Table Top, H₂O) - Vibrates liquid materials
Roller Bottle Apparatus - Vibrates liquid materials
Incubators (CO₂, Dry Air) - Grows cells as raw materials
Sterilizers - Prevents contamination of materials
Ovens (Drying, Vacuum) - Dries materials
Washing Manifolds for Elisa Plates - Tests for quality control in production
Elisa Plates - Tests for quality control in production
Scintillation Counter - Monitors production materials
Fermentors - Grows cells for raw materials
Spectrophotometer with Accessories - Measures production materials
Darkroom Tanks - Monitors production materials
Darkroom Processor and Accessories - Monitors production materials
Gel Equipment (Vertical, Horizontal) - Monitors production materials
Electro Blot Transfer - Monitors production materials
Gel Dryer - Monitors production materials
Gene Machines - Separates production materials
Gene Machine Power Supplies - Separates production materials
Gene Machine Pumps - Separates production materials
Gene Machine Fraction Columns - Separates production materials
Temperature Calculators - Monitors production materials
pH Meters - Monitors production materials
Lyophilizers - Removes water from production material
Balances - Weighs production material
Microscopes (Light, Fluorescent) - Checks quality of production material
Camera - Checks quality of production material
Vacuum Pumps - Filters production solutions
Elisa Reader - Monitors materials during production
Fluorimeter - Monitors materials during production
Pipetmen - Measures production material
Seal-a-Meals - Packages raw materials and finished products
Klett Colorimetric - Measures and produces production materials
Spec 20 - Measures and produces production materials
HPLC - Measures and produces production materials

Trans Illuminator - Measures and produces production materials
Distillation Apparatus - Measures and produces production materials
Gene Synthesizer - Measures and produces production materials
Sequencing Apparatus - Measures and produces production materials
Col. Chromotography Equipment - Measures and produces production materials
Gradient Makers - Measures and produces production material
Vortexes - Mixes production solutions
Hot Plate Stirrers - Mixes production solutions
Liquid Nitrogen Tanks - Freezes materials in production process
Microwave Ovens - Heats materials in production process
UV Box - Monitors production process
Glove Box - Used to manipulate materials
Hoods (Tissue, Fume, Bench Top) - Removes contaminants from air in production area

Storage Equipment

Crushed Ice Machine
Refrigerator
Freezers

Safety Equipment

Eyewashes
Safety Showers

LAW

Section 210.18 of the Tax Law allows a research and development credit against the tax imposed under Article 9-A of the Tax Law equal to ten percent of the cost or other basis of tangible personal property and other tangible property, including buildings and structural components of buildings which:

- (1) are acquired, constructed, reconstructed or erected by the taxpayer after June 30, 1982;
- (2) are depreciable pursuant to section 167 of the Internal Revenue Code or recovery property with respect to which a deduction is allowable under section 168 of the Internal Revenue Code;
- (3) have a useful life of four years or more;
- (4) are acquired by purchase as defined in section 179(d) of the Internal Revenue Code;
- (5) have a situs in New York State; and
- (6) are used or are to be used for purposes of research and development in the experimental or laboratory sense. Such purposes do not include the ordinary testing or inspection of materials or products for quality control, efficiency surveys, advertising promotions, or research in connection with literary, historical or similar projects.

Generally, the credit is allowed for all property used directly to perform research to develop experimental or pilot models, plant processes, formulas, inventions and similar properties and improvements of already existing properties of the type mentioned. Additionally, the credit is allowed for property used to store research materials and property used to create environments necessary to conduct research such as air conditioning or air purifying equipment. Buildings and structural components of buildings in which qualifying equipment is used may also qualify.

The credit is not allowed for any property for which the research and development deduction under section 210.3(e)(3) of the Tax Law has been taken; the eligible business facility credit under section 210.11 of the Tax Law has been taken or the investment tax credit under section 210.12 of the Tax Law has been taken. Additionally, the credit is not allowed if the property is leased to any other person or corporation.

Section 210.12 of the Tax Law allows an investment credit against the tax imposed under Article 9-A of the Tax Law equal to six percent of the cost or other basis of tangible personal property and other tangible property, including buildings and structural components of buildings which:

- (1) are acquired, constructed, reconstructed or erected after June 30, 1982;
- (2) are depreciable pursuant to section 167 of the Internal Revenue Code or recovery property with respect to which a deduction is allowable under section 168 of the Internal Revenue Code;
- (3) have a useful life of four years or more;
- (4) are acquired by purchase as defined in section 179(d) of the Internal Revenue Code;
- (5) have a situs in New York State; and
- (6) are 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.

"Manufacturing" means the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment. Property used in production includes all facilities used in the production operation, including storage of material to be used in production and of the products that are produced.

The credit is not allowed for any property which is leased by the taxpayer to any other person or corporation.

Section 210.12-A of the Tax Law allows an employment incentive credit against the tax imposed under Article 9-A of the Tax Law in each of the three years succeeding the taxable year for which an investment credit has been allowed under section 210.12 of the Tax Law. The amount of

the credit allowed in each of the three years is fifty percent of the investment credit allowed. However, the credit is allowed only in taxable years when the average number of employees during each such year is at least 101% of the average number of employees during the taxable year immediately preceding the taxable year for which the investment credit is allowed.

Section 5-3.2(a) of the regulations of the State Tax Commission provides:

The average number of employees in a taxable year as used in this Subpart is computed as follows:

- (1) ascertain the number of employees within New York State, except general executive officers, employed by the taxpayer on March 31st, June 30th, September 30th, and December 31st in the taxable year;
 - (2) add together the number of employees ascertained on each of such dates; and
 - (3) divide the sum by the number of such dates occurring within the taxable year.
- 20 NYCRR 5-3.2

CONCLUSIONS

Issue I - Research and Development Credit

All of the equipment listed above which is used to process, measure and monitor research materials is used directly to perform research to develop experimental models of its diagnostic products. Accordingly, such equipment is used for purposes of research and development in the experimental or laboratory sense. Similarly, the equipment used in conjunction with the above equipment to store research materials and to maintain the necessary research environment listed above are all deemed to be used for purposes of research and development in the experimental or laboratory sense. However, the safety equipment listed above is not deemed to be used in research and development notwithstanding that such equipment is a necessary adjunct to the research process.

Accordingly, since all of the equipment listed as "Equipment Used to Conduct Research" and as "Equipment Used to Store Research Materials" meets each of the requirements of section 210.18 of the Tax Law, the research and development credit is allowed for all such equipment. The research and development credit is not allowed for the equipment listed as "Safety Equipment".

Issue II - Investment Tax Credit

All of the equipment listed above which is used to process, measure and monitor materials which become part of the diagnostic kits sold by Petitioner is equipment principally used in manufacturing. Accordingly, such equipment is principally used by the taxpayer in the production of goods by manufacturing within the meaning of the statute. Similarly, the equipment used to store raw materials and finished products is deemed to be principally used by the taxpayer in the production of goods by manufacturing within the meaning of the statute. However, safety equipment listed above is not deemed to be used in the production of goods by manufacturing.

Accordingly, since all of the equipment listed as "Production Equipment" and "Storage Equipment" meets each of the requirements of section 210.12 of the Tax Law, the investment tax credit is allowed for all such equipment. The investment tax credit is not allowed for the equipment listed as "Safety Equipment".

Issue III - Employment Incentive Credit

Where a taxpayer qualifies for an investment tax credit with respect to eligible property, the taxpayer may also qualify for an employment incentive credit for each of the three years next succeeding the taxable year for which the taxpayer qualified for the investment tax credit. The taxpayer will qualify for the credit in each of the years in which the average number of taxpayer's employees is at least 101 percent of the average number of employees during the taxable year immediately preceding the taxable year for which the investment was allowable (the base year). Each year's qualification is determined separately. If a taxpayer fails to have a sufficient number of employees in one or two of the three years, it will nevertheless qualify for the credit in the year or years in which it has a sufficient number of employees.

Accordingly, since the Petitioner qualifies for the investment tax credit, it will also qualify for the employment incentive credit in each of the next succeeding three years if the number of its employees is at least 101% of the number of its employees in the base year. The amount of Petitioner's credit in each of the three years will equal one-half of Petitioner's investment tax credit (i.e. one-half of six percent) for a total of nine percent if Petitioner qualifies in all three years. This amount is in addition to the six percent credit allowed for the investment tax credit.

It should be noted that section 210.12(f) of the Tax Law provides that:

(f) At the option of the taxpayer . . . research and development facilities which qualify for elective deduction under subparagraphs two and three of paragraph (e) of subdivision three of this section may be treated as property 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, provided the property otherwise qualifies under paragraph (b) of this subdivision, in which event, a deduction shall not be allowed under such paragraph (g), a credit shall not be allowed under such subdivision eleven and a deduction shall not be allowed under such subparagraph three of paragraph (e).

Pursuant to this section, all of Petitioner's property which qualifies as property used in research and development in the experimental or laboratory sense may be treated as property principally used by Petitioner in the production of goods by manufacturing. Since Petitioner's research and development property otherwise qualifies under section 210.12(b) of the Tax Law, Petitioner may elect, pursuant to section 210.12(f) of the Tax Law, to claim the investment tax credit in lieu of the research and development credit allowable pursuant to section 210.18 of the Tax law. If Petitioner elects to claim the investment tax credit and in succeeding taxable years qualifies pursuant to section 210.12-A of the Tax Law for the employment incentive tax credit, such credit may also be claimed for the appropriate taxable years.

A taxpayer must claim the research and development credit, the investment tax credit and the employment incentive credit for the taxable year in which the taxpayer first qualifies for the credit. If a taxpayer fails to claim a credit for the taxable year in which it first qualifies for the credit, it may not claim the credit in a subsequent year. However, in such a case, the taxpayer may file amended returns for the taxable years in which the credits should have been claimed (as long as the period for filing such amended returns has not expired) and thereby claim the credit.

Section 1087(a) of the Tax Law provides that a claim for credit or refund of an overpayment of tax must be filed by a taxpayer within three years from the date the return was filed or two years from the date the tax was paid, whichever of such periods expires later. If a taxpayer files such an amended return, it may claim a refund to taxes previously paid (subject to the limitations set forth in sections 210.12(e), 210.12-A(c) and 210.18(e)) or it may carry over the credits to the following year or years and apply the credits against taxes for such year or years.

DATED: September 10, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.