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

TSB-A-87 (9) C
Corporation Tax
April 29, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C850528A

On May 28, 1985, a Petition for Advisory Opinion was received from John J. Eagan, Norris, McLaughlin & Marcus, 1081 Rt. 22, P.O. Box 310, Somerville, New Jersey 08876.

The issues raised for purposes of Article 9-A of the Tax Law, are (1) whether a corporate partner of a partnership will be able to claim its allocable share of the cost or other basis of tangible personal property for purposes of the investment tax credit pursuant to section 210.12(a) of the Tax Law where the partnership purchases tangible personal property that qualifies for the credit and (2) whether the corporation qualifies as a new business pursuant to Section 210.12(j) of the Tax Law and is therefore eligible to claim a refund of the credit pursuant to section 210.12(e) of the Tax Law.

Issue (1)

"Xco.", a New York corporation, is a partner of a partnership engaged in business in New York State. The partnership intends to purchase tangible personal property for use in its production process, in fact, the partnership was formed in 1985 for the purpose of acquiring the production equipment.

Petitioner contends that based on section 210.12(a) of the Tax Law, a credit should be permitted for production equipment not only in situations where Xco. directly purchases the equipment but also in situations where the cost or other basis of such equipment passes through from a partnership. Petitioner feels that this result is consistent with analogous situations, such as the treatment of shareholders of S corporations and individual partners of a partnership, and conforms with the general pattern for taxing a corporate partner on its allocable share of partnership items.

A partnership itself is not taxable under Article 9-A of the Tax Law. As such, a partnership would not be allowed an investment tax credit pursuant to section 210.12(a) of Article 9-A since there is no liability under Article 9-A to which the credit could be applied.

Each corporation subject to tax under Article 9-A of the Tax Law is required to compute its entire net income pursuant to section 208.9 of the Tax Law. The starting point for such computation is the corporation's entire taxable income as required to be reported for federal income tax purposes. Pursuant to the Internal Revenue Code, each corporation must include in federal entire taxable income its allocable or pro rata share of the partnership income, gains, losses and deductions. (Internal Revenue Code §702).

It should be noted that for federal income tax purposes each partner would be allowed an investment tax credit for the partner's allocable or pro rata share of the partnership's qualifying property.

Tax Law section 210.12(a) provides that a taxpayer is allowed a credit against the tax imposed by Article 9-A, with respect to 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 December 31, 1968;

(2) are depreciable pursuant to section 167 of the Internal Revenue Code or recovery property with respect to which an accelerated cost recovery system 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 the taxpayer 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.

Section 210.12(b) of the Tax Law clearly requires that all of the above criteria be met before an investment tax credit is allowed. The criteria at issue herein are whether the property qualifying for the investment tax credit is acquired by the taxpayer by purchase as defined in section 179(d) of the Internal Revenue Code and whether such property is principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, etc. It is assumed for purposes of this advisory opinion that the property purchased by the partnership will satisfy the requirements of criteria (1), (2), (3) and (5) above.

Tangible property that a partnership purchases, as defined in section 179(d) of the Internal Revenue Code, is deemed to be purchased by each partner to the extent of the partner's allocable or pro rata share of the partnership's property. Accordingly, tangible property that is deemed to be purchased by a corporate partner pursuant to section 179(d) of the Internal Revenue Code will be deemed to be acquired by purchase for purposes of section 210.12(b) of the Tax Law.

The requirement in section 210.12(b) of the Tax Law that the property must be principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, etc. is not as easily determined. In Matter of Havemeyer, 17 NY2d 216 (1966), it was held that, by reason of New York State's adoption of section 26 of the Uniform Partnership Act in section 52 of the New York Partnership Law, a partner's interest is intangible personalty

rather than a direct tangible share of the underlying partnership assets. Therefore, a strict interpretation of section 210.12(b) of the Tax Law, based upon Havemeyer, would deny the pass-through to the corporate partner of the principal use of the qualifying property because the partnership is using the property, not the partners.

However, in Symphony Space v. Tishelman, 60 NY2d 33 (1983), the Court of Appeals invoked statutory purpose over the doctrine that tax exemptions are to be strictly construed. It stated:

> While exemption statutes should be construed against the taxpayer seeking the benefit of the exemption, an interpretation so literal and narrow that it defeats the exemption's settled purpose is to be avoided. Id. at 36.

The legislative history of Chapter 1072, of the Laws of 1969, which enacted the investment tax credit, states the following:

> This bill would replace all double depreciation provisions with a tax credit equal to one percent of qualified capital investment.... The credit would be available to all taxpayers now eligible for double depreciation benefits.... (1969 N.Y.S. Legislative Annual p. 448).

Inasmuch as each corporate partner was entitled to its share of the double depreciation benefit prior to enactment of the credit, it is concluded that the Legislature intended that such corporate partner also be allowed its share of the investment tax credit.

Accordingly, Xco. will be allowed an investment tax credit pursuant to section 210.12(a) of the Tax Law for its allocable share of the cost or other basis of qualifying tangible personal property where the property qualifying for the credit is purchased by the partnership.

Issue (2)

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

> [I]f the amount of credit allowable under this subdivision for any taxable year reduces the tax to the minimum fixed by clause four of paragraph (a) of subdivision one of this section, 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 this subdivision may elect to treat the amount of such carryover as an overpayment of tax to be credited or refunded....

Section 210.12(j) of the Tax Law provides that:

> For purposes of paragraph (e) of this subdivision, 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 by a taxpayer subject to tax under this article; section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five or one hundred eighty-six of article nine; article thirty-two or thirty-three of this chapter; or
>
> (2) is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article; section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five or one hundred eight-six of article nine; article thirty-two or thirty-three of this chapter; article twenty-three of this chapter or which would have been subject to tax under such article twenty-three (as such article was in effect on January first, nineteen hundred eighty) or the income (or losses) of which is (or was) includable under article twenty-two of this chapter whereby the intent and purpose of this paragraph and paragraph (e) of this subdivision with respect to refunding of credit to new business would be evaded; or
>
> (3) has been subject to tax under this article for more than four taxable years (excluding short taxable years) prior to the taxable year during which the taxpayer first becomes eligible for the investment tax credit.

Where a taxpayer is allowed an investment tax credit, such taxpayer may elect to have the amount of any carryover treated as an overpayment of tax if such taxpayer is a new business pursuant to section 210.12(j) of the Tax Law. If the taxpayer is a corporate partner in a partnership, the corporation must qualify as a new business regardless of the status of the partnership, because it is the corporation, not the partnership, that is claiming the investment tax credit.

Accordingly, if Xco., itself, is a new business pursuant to section 210.12(j) of the Tax Law, it may elect, pursuant to section 210.12(e) of the Tax Law, to treat as an overpayment of tax to be credited or refunded the amount of the carryover of its allowable investment tax credit determined pursuant to section 210.12(a) of the Tax Law.

DATED: April 29, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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