

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

TSB-A-92 (12) C
Corporation Tax
September 30, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C920714B

On July 14, 1992, a Petition for Advisory Opinion was received from Paul M. Healey, CPA, 523 Covington Place, Slingerlands, New York 12159.

The issue raised by Petitioner, Paul M. Healey, is whether for purposes of Article 9-A of the Tax Law the unused investment tax credit computed pursuant to section 210.12(e) of the Tax Law by NEWCO is refundable for a new business pursuant to section 210.12(j) of the Tax Law.

NEWCO was incorporated during 1984 and is taxable under Article 9-A. The company's first short taxable year is the period ending July 31, 1985.

NEWCO has been engaged in manufacturing from its inception. Capital expenditures were incurred by NEWCO during taxable years 7/31/85, 7/31/86 and 7/31/87 and the expenditures met all the requirements, pursuant to section 210.12(b) of the Tax Law, for qualifying for the investment tax credit. NEWCO also met the requirements for status as a new business pursuant to section 210.12(j)(1) and section 210.12(j)(2) of the Tax Law.

The filing dates for NEWCO's CT-3 returns are as follows:

7/31/85	October 1, 1985
7/31/86	October 1, 1991
7/31/87	October 1, 1991

<u>FORM CT 46</u>	<u>DATE FORM</u>
<u>FILING PERIOD</u>	<u>CT 46 FILED</u>

7/31/85	October 1, 1985
7/31/86	October 1, 1991
7/31/87	October 1, 1991

NEWCO requested a refund of the unused investment tax credit for taxable years ended 7/31/85, 7/31/86 and 7/31/87, by filing form CT-46.1 on October 1, 1991 for taxable year 7/31/87.

Section 210.12(a) and (b) of the Tax Law provide 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 requires that all of the above criteria be met before an investment tax credit is allowed.

Section 5-2.1 of the Business Corporation Franchise Tax Regulations provides that the investment tax credit must be claimed for the first taxable year in which the property becomes a qualified property pursuant to section 210.12(b) of the Tax Law.

For the taxable years at issue herein, section 210.12(e) of the Tax Law provides, in part, that:

However, if 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

For the taxable years at issue herein, 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 eighty-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.

Herein, Petitioner states that NEWCO's capital expenditures incurred during taxable years 7/31/85, 7/31/86 and 7/31/87 qualify for the investment tax credit and, that NEWCO qualifies as a new business pursuant to section 210.12(j) of the Tax Law. Petitioner also states that the investment tax credit was claimed on Form CT46 for each taxable year at issue, and that for taxable year 7/31/85 the CT46 was filed with the CT3 Report on 10/1/85 and for taxable years 7/31/86 and 7/31/87 the CT46s were filed with the CT3 Reports on 10/1/91.

Assuming NEWCO has an unused investment tax credit computed pursuant to section 210.12(e) of the Tax Law for taxable year ended 7/31/87, NEWCO, as a new business for the taxable years at issue, may request a refund of such unused investment credit for taxable year ended 7/31/87 pursuant to section 210.12(j) of the Tax Law. Petitioner states that NEWCO filed such a claim for refund of the unused investment tax credit by filing Form CT46.1 on 10/1/91 for taxable year 7/31/87. Pursuant to section 210.12(e) of the Tax Law, no interest shall be paid on such refund.

It should be noted that a claim for refund of unused investment tax credit by a new business must be filed for a taxable year that the taxpayer was a new business. For example, if Newco, herein, had filed the claim for refund of unused investment tax credit for taxable year ended 7/31/91, such refund would be denied even if the unused investment credit was carried over from taxable years 7/31/85, 7/31/86, and 7/31/87.

It should also be noted that any additional investment tax credit computed pursuant to section 210.12-A of the Tax Law is never refundable.

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Further, in the event that Newco was a subsidiary of an Article 9-A taxpayer for the taxable years at issue, Newco would not qualify as a new business pursuant to section 210.12(j) of the Tax Law for any taxable year and the unused investment tax credit computed pursuant to section 210.12(e) of the Tax Law would not be refundable.

DATED: September 30, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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