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

TSB-A-99(18)C
Corporation Tax
April 7, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C981026C

On October 26, 1998, a Petition for Advisory Opinion was received from Scepter, Inc., 1485 Scepter Lane, Waverly, Tennessee 37185.

The issue raised by Petitioner, Scepter, Inc., is whether it qualifies as a "new business" for purposes of the refundable investment tax credit as defined in section 210.12(j) of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner was incorporated in Tennessee on April 19, 1988, and began doing business in New York State on June 30, 1997. The principal business activity of Petitioner is processing and manufacturing of aluminum ingots. Petitioner is an S corporation for federal income tax purposes and is a C corporation (a non-electing S corporation) for New York State franchise tax purposes.

On June 30, 1997, a merger was effected between Petitioner, Scepter Ingot Casting, Inc. ("SICI"), a Tennessee corporation, and Scepter Industries, Inc. ("SII"), an Oklahoma corporation, with Petitioner being the surviving corporation. Petitioner, SICI and SII are all commonly owned by a single individual who is a nonresident of New York State. This individual has never held an interest in any metal manufacturing business that was taxable in New York State prior to June 30, 1997.

While in existence, SII did not conduct any activities in New York State. However, SICI through a division, Scepter Resources ("SR"), did business in New York State from September 1, 1994, until the date of the merger, June 30, 1997. As of the date of the merger, SR became a division of Petitioner. SR has approximately two employees, is located in Rye, New York and conducts metal trading activities. SR's trading activities are not performed on any Board or Exchange, rather, such trading is accomplished through and among SR's contacts in the metal industry.

SICI, in addition to SR, had another division located in Waverly, Tennessee ("WT"), which became a division of Petitioner as of the date of the merger. WT is in the business of converting dross, scrap aluminum and raw materials into molten aluminum. SII had a division located in Bicknell, Indiana ("BI") that performed the same business activities as WT. As of the date of the merger, WT is also a division of Petitioner.

Due to SR's activities in New York, SICI filed New York State franchise tax returns under Article 9-A of the Tax Law for the short period from September 1, 1994 through December 31, 1994, for the calendar years ended December 31, 1995, and 1996, and for the short period from January 1, 1997 through June 30, 1997. As of the date of the merger, Petitioner, due to SR's activities in New York, is subject to Article 9-A of the Tax Law. Petitioner filed its tax return for the short period from June 30, 1997 through December 31, 1997.

Petitioner is proposing to construct a facility in Seneca Falls, New York on what was formerly a vacant lot. This Seneca Falls facility ("SFF") will be a division of Petitioner in addition to BI, SR and WT. SFF will be a state-of-the-art aluminum processing facility. When complete, the facility will consist of an office building, 100,000 square feet of building space to house furnaces, and a salt cake building on 29 acres. In order to construct the facility Petitioner will employ approximately 50 to 60 workers. When complete, SFF will have approximately 30 full time personnel that will work 4 shifts, 24 hours per day, 7 days per week.

In addition to creating new jobs in upstate New York, SFF will provide services to large New York State aluminum companies and aluminum freight companies also located in upstate New York State. These aforementioned New York State aluminum companies will benefit from having SFF's aluminum processing facilities located in New York State. The closest facilities that provide similar services are located outside of New York State in Ohio and Quebec, Canada.

Petitioner states that for purposes of this advisory opinion, it should be assumed that the assets that have been acquired and any future asset acquisitions by Petitioner for SFF will qualify for the investment tax credit under section 210.12(b)(i) of the Tax Law as property principally used by Petitioner in the production of goods by manufacturing.

Discussion

Section 210.12(e)(1) of the Tax Law, provides, in part, that:

> if the amount of credit allowable under this subdivision for any taxable year reduces the tax to [the higher of the amounts prescribed in section 210.1(c) and (d) of the Tax Law] ... any amount of credit allowed for a taxable year commencing on or after [January 1, 1987] and not deductible in such year may be carried over to the fifteen taxable years next following such taxable year 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 [section 210.12(j) of the Tax Law] may elect to treat the amount of such carryover as an overpayment of tax to be credited or refunded in accordance with the provisions of [section 1086 of the Tax Law], provided, however, the provisions of [section 1088(c) of the Tax Law] notwithstanding, no interest shall be paid thereon.

Section 210.12(j) of the Tax Law provides that for purposes of section 210.12(e) of the Tax Law, a "new business" shall include any corporation except:

> 1. a corporation in which over 50% of the number of shares of stock entitling their holders to vote for the election of directors or trustees is owned or controlled, either directly or indirectly, by a taxpayer subject to tax under Article 9-A; section 183, 184, 185, 186 of Article 9; Article 32 or 33 of the Tax Law; or
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> 2. a corporation that is substantially similar in operation and in ownership to a business entity or entities taxable, or previously taxable under Article 9-A; section 183, 184, 185, or 186 of Article 9; Article 32 or 33; or Article 23 or that would have been subject to tax under Article 23, as such article was in effect on January 1, 1980, or the income (or losses) of which is (or was) includable under Article 22 of the Tax Law whereby the intent and purpose of section 210.19(e) of the Tax Law with respect to refunding of credit to new business would be evaded; or
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> 3. a corporation that has been subject to tax under Article 9-A for more than four years (excluding short periods) prior to the taxable year during which the taxpayer first becomes eligible for the investment tax credit.

Chapter 103 of the Laws of 1981, created the refundable investment tax credit at issue. A review of the legislative history discloses that this law was intended to accomplish the following: "It expands and enriches various investment incentives to assure continued economic growth in the State" (Memorandum In Support, Governor's Bill Jacket, L 1981, ch 103). The Budget Report Memorandum (Governor's Bill Jacket, L 1981, ch 103) noted the following "brief recapitulation" of the sessions law: "To encourage business investments in New York State by liberalizing and increasing certain investment incentives and credits under the corporate franchise and personal income taxes." (See also, International Imaging Materials, Inc, Dec Tax App Trib, TSB-D-95(4)C, June 8, 1995.)

The settled purpose of the statute at issue was to encourage business investments in New York State. An expansive interpretation of "substantially similar operations", without regard to whether such substantially similar operations were conducted by a company related to the taxpayer in New York, would defeat such purpose. (cf., Symphony Space v Tishelman, 60 NY2d 33; Brooklyn Union Gas v Commr of Dept of Fin., 108 AD2d 74, revd on other grounds 67 NY2d 1036). Therefore, in order to give effect to the Legislature's purpose, the statute should be interpreted so that a refundable investment tax credit would not be disallowed to a taxpayer related to a corporation that had conducted substantially similar operations outside of New York State.

Based on the facts presented, it appears that:

1. Petitioner is not a corporation owned or controlled, either directly or indirectly by a taxpayer subject to tax under Article 9, 9-A, 32 or 33 of the Tax Law.

2. Petitioner will be similar in ownership to SICI, a business entity previously taxable under Article 9-A, because the same individual owned both entities before the merger. However, based on legislative history, it is determined that Petitioner will not be similar in operation to SICI, because Petitioner's principal business activity is the processing and manufacturing of aluminum ingots, and SICI's activities in New York, conducted through SR, were metal trading activities that do not involve the processing and manufacturing of aluminum, and its activities conducted through WT, in converting dross, scrap aluminum and raw materials into molten aluminum, while similar to Petitioner's activities, were not conducted in New York State. Further, SII had no activities in New York, and although the activities of BI, a division of SII, were similar to Petitioner's activities, BI's activities, like WT, were not conducted in New York State.

3. Petitioner began doing business in New York State on June 30, 1997 when SICI was merged into it. Therefore, Petitioner, as a calendar year taxpayer, would not be a corporation that is subject to tax under Article 9-A for more than four years through calendar year ending December 31, 2001.

Accordingly, Petitioner will be considered a "new business" pursuant to sections 210.12(j) and 210.12(e) of the Tax Law, for purposes of the refundable investment tax credit, for those taxable years that it meets the requirements of section 210.12(j)(3) of the Tax Law.

DATED: April 7, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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