New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(6)I
Income Tax
September 18, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I020424A

On April 24, 2002, a Petition for Advisory Opinion was received from Arthur J. Giglio, CPA, 250 East Hartsdale Avenue, Suite 34, Hartsdale, NY 10530.

The issue raised by Petitioner, Arthur J. Giglio, CPA, is whether the amount of the alternative fuels credit allowed pursuant to section 606(p) of the Tax Law is subject to any limitations or reductions based on the amount of the nonqualified nonrecourse financing with respect to the applicable property, or the amounts "at risk" as defined in section 465 of the Internal Revenue Code (IRC), or "passive activity" loss or credit as defined in section 469 of the IRC.

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

A manufacturer of equipment which qualifies as "clean fuel vehicle refueling property" under section 606(p)(4) of the Tax Law wishes to sell one unit of such equipment to a limited liability company. The limited liability company is wholly owned by individual New York taxpayers and is treated as a partnership for federal income tax purposes. Prior to such sale, a third party enters into an agreement with the manufacturer to lease the unit from the manufacturer or its transferee once the unit is placed in service on the third party's premises. The limited liability company then purchases the equipment from the manufacturer, subject to a lease, for $600,000, consisting of a $200,000 down payment and an interest-bearing nonrecourse note in the amount of $400,000. For federal income tax purposes, the aggregate amount at-risk under section 465 of the IRC is $200,000, and any losses of the limited liability company reported by its members would be treated as passive activity losses under section 469 of the IRC.

Applicable Law

Section 606(p) of the Tax Law contains the provisions for the alternative fuels credit, and provides, in part:

> (1) General. A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article, for electric vehicles, clean-fuel vehicle property and clean-fuel vehicle refueling property placed in service during the taxable year. Provided, however, that the credit provided for by this subsection with respect to electric vehicles shall not be allowed to a gas corporation or an electric corporation as defined in subdivisions eleven and thirteen, respectively, of section two of the public service law, or a gas and electric corporation as described in section sixty-four of the public service law, where such corporation is subject to the supervision of the department of public service.

* * *

(4) Clean-fuel vehicle refueling property. The credit under this subsection for clean-fuel vehicle refueling property shall equal fifty percent of the cost of any such property.

(A) which is located in this state and

(B) for which a deduction is allowed under section one hundred seventy-nine-A of the internal revenue code (determined without regard to the limitations prescribed in paragraph two of subsection (b) of such section or the election referred to in subsection (e) of such section with respect to section one hundred seventy-nine of such code).

(5) Definitions.

* * *

(B) The terms "clean-fuel vehicle property" and "clean-fuel vehicle refueling property" mean any such property which is qualified within the meaning of subsections (c) and (d), respectively, of section one hundred seventy-nine-A of the internal revenue code.

Section 179A of the IRC contains a deduction for clean-fuel vehicles and certain refueling property and provides, in part:

(a) Allowance of deduction.

(1) In general. There shall be allowed as a deduction an amount equal to the cost of

(A) any qualified clean-fuel vehicle property, and

(B) any qualified clean-fuel vehicle refueling property.

The deduction under the preceding sentence with respect to any property shall be allowed for the taxable year in which such property is placed in service.

(2) Incremental cost for certain vehicles. If a vehicle may be propelled by both a clean-burning fuel and any other fuel, only the incremental cost of permitting the use of the clean-burning fuel shall be taken into account.

(b) Limitations.

* * *

(2) Qualified clean-fuel vehicle refueling property.

(A) In general. The aggregate cost which may be taken into account under subsection (a)(1)(B) with respect to qualified clean-fuel vehicle refueling property placed in service during the taxable year at a location shall not exceed the excess (if any) of

(i) $100,000, over

(ii) the aggregate amount taken into account under subsection (a)(1)(B) by the taxpayer (or any related person or predecessor) with respect to property placed in service at such location for all preceding taxable years.

* * *

(d) Qualified clean-fuel vehicle refueling property defined. For purposes of this section, the term "qualified clean-fuel vehicle refueling property" means any property (not including a building and its structural components) if

(1) such property is of a character subject to the allowance for depreciation,

(2) the original use of such property begins with the taxpayer, and

(3) such property is

(A) for the storage or dispensing of a clean-burning fuel into the fuel tank of a motor vehicle propelled by such fuel, but only if the storage or dispensing of the fuel is at a point where such fuel is delivered into the fuel tank of the motor vehicle, or

(B) for the recharging of motor vehicles propelled by electricity, but only if the property is located at the point where the motor vehicles are recharged.

Opinion

Section 606(p) of the Tax Law allows a credit against personal income tax for electric vehicles, clean-fuel vehicle property and clean-fuel vehicle refueling property placed in service

during the taxable year. Section 606(p) does not require that the credit base be reduced by the amount of the nonqualified nonrecourse financing with respect to the property, and does not contain any limitations similar to those contained in section 465 of the IRC respecting the amount at-risk or contained in section 469 of the IRC respecting the amount of passive activity losses.

Therefore, based on the facts submitted by Petitioner, the amount of the alternative fuels credit that would be allowed under section 606(p) of the Tax Law would be $300,000, assuming that the taxpayer qualified for the credit. It should be noted that no opinion is expressed about whether the credit would be allowable under the facts submitted by Petitioner where the taxpayer is not the user of the equipment.

DATED: September 18, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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