

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

TSB-A-88 (3) I
Income Tax
March 30, 1988

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. I880125B

On January 25, 1988, a Petition for Advisory Opinion was received from Gunther and Wilhelmine Kronenberger, 115 Kirklees Road, Pittsford, New York, 14534.

The issue raised is whether the Petitioner, as a shareholder of an S corporation, is entitled to a pass through of the S corporation's employment incentive tax credit provided for under section 210.12-A of the Tax Law.

Mr. Kronenberger is the sole shareholder of Kronenberger Wahl Corporation a New York corporation located in East Rochester, New York - engaged in the machining industry. In November 1983, the corporation elected Subchapter S status for both Federal and New York State income tax purposes.

Petitioners state that during 1984 and 1985 they expanded their workforce and placed into service new equipment costing \$402,376. As a result, it is the Petitioners' opinion that they have helped the community to rebuild itself by teaching their employees new skills and expanding both the workforce and the manufacturing facilities. For this reason, the Petitioners contend they should be able to take advantage of the employment incentive tax credit.

Section 210.12-A of Article 9-A of the Tax Law states, in part, that "a corporation which acquires, constructs, reconstructs, or erects property, for which an investment tax credit is allowed under Section 210.12 of the Tax Law, will be allowed an additional investment tax credit." [T]he additional credit shall only be allowed for those years during which the taxpayer's average number of employees in New York, except general executive officers, is at least 101% of the average number of employees in New York, except general executive offices, during the taxable year immediately preceding the taxable year for which the original investment tax credit was allowed.

Section 660(a) of the Tax Law provides that if a corporation which is an S corporation for federal income tax purposes is subject to tax under Article 9-A of the Tax Law, the shareholders of the corporation may elect S corporation status for New York State purposes, as well.

Section 606(i) of the Tax Law, as added by Chapter 606 of the Laws of 1984, provides that where the election provided for in section 660(a) is in effect, the shareholder of an S corporation shall be allowed a credit equal to his pro rata share of the credits under subdivisions 12, 17 and 18 of section 210 determined for the Corporation for which such election is in effect. The employment incentive credit under subdivision 12-A of section 210 is not included among the credits which are allowed to shareholders of S corporations under section 606(i) of the Tax Law. It is noted that subsequent to 1984, section 606(i) was amended several times. However, none of these amendments result in a change to the answer to the question here at issue.

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In enacting Chapter 606 of the Laws of 1984, the New York State Legislature was reacting to a change in the federal tax treatment of S corporations. For federal purposes, S corporations are treated in a manner similar to the treatment of partnerships with a pass through of each item of income, loss and deduction and the retention of the character of each item for purposes of determination of tax. Memorandum of Senator Walter J. Floss, Jr., 1984 Legislative Annual, p. 211. It was clearly the intention of the Legislature to treat S corporation for New York tax purposes similarly to partnerships. It is noted that for New York tax purposes, partnerships and their partners are not allowed an employment incentive tax credit. Thus, in this respect, shareholders of S corporations receive the same treatment as partners.

Accordingly, since the employment incentive tax credit is not one of the specifically enumerated credits allowable to shareholders of S corporations under section 606(i) of the Tax Law, Petitioners are not entitled to a pass through of their S corporation's employment incentive credit.

DATED: March 30, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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