

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

TSB-A-04(11)C  
Corporation Tax  
June 15, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C040206A

On February 6, 2004, a Petition for Advisory Opinion was received from Deutsche Bank Securities Incorporated, 60 Wall Street, New York, New York 10019.

The issues raised by Petitioner, Deutsche Bank Securities Incorporated, are:

1. Whether property owned by a corporation taxed under Article 9-A of the Tax Law, and leased to an alien bank which is a regulated dealer taxed under Article 32 of the Tax Law, is eligible for the investment tax credit under section 210.12 of the Tax Law.
2. Whether property owned by a corporation taxed under Article 9-A of the Tax Law, and leased to a domestic bank which is a regulated dealer taxed under Article 32 of the Tax Law, is eligible for the investment tax credit under section 210.12 of the Tax Law.
3. For purposes of the investment tax credit under section 210.12 of the Tax Law, how is the *principal use* test computed when property, such as a building, is used in qualifying broker or dealer activities by multiple affiliates?

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

Deutsche Bank AG (“DB”) is an alien bank that is taxed under Article 32 of the Tax Law. It acts as a dealer in securities and commodities. Its United States operations are subject to regulation, supervision and examination by the Federal Reserve Board and its New York branch is also supervised by the New York State Banking Department. DB indirectly owns all the stock of Petitioner, a broker-dealer regulated by the Securities and Exchange Commission (SEC). Petitioner is taxed under Article 9-A of the Tax Law. DB also indirectly owns all the stock of Deutsche Bank Trust Company of the Americas (“BT”), a domestic bank taxed under Article 32 of the Tax Law that acts as a dealer in securities and commodities. BT is subject to regulation, supervision and examination by both the Federal Reserve Board and the New York State Banking Department, and is also subject to relevant FDIC regulation. Through a single member limited liability company (LLC), treated as a disregarded entity for federal income tax purposes, Petitioner has purchased an office building located at 60 Wall Street, New York, New York.

Of the usable floor space in the office building, 45 percent is occupied by Petitioner and used by Petitioner in its business as a broker-dealer in connection with the purchase or sale of stocks, bonds or other securities or of commodities. Five percent is occupied by Petitioner and used by Petitioner in activities other than its business as a broker-dealer. Ten percent of the usable floor space is leased to unrelated third parties. The remaining 40 percent of the usable floor space is

leased equally to DB and BT. Of the 20 percent of the total usable floor space leased to DB, one-fourth (5 percent of the total usable floor space) is used in DB's business as a regulated dealer in connection with the purchase or sale of stocks, bonds or other securities or of commodities, and three-fourths is used in other activities. Of the 20 percent of the total usable floor space leased to BT, one-fourth (5 percent of the total usable floor space) is used in BT's business as a regulated dealer in connection with the purchase or sale of stocks, bonds or other securities or of commodities, and three-fourths is used in other activities. (These percentages are illustrative and intended to highlight the legal issues involved.)

Petitioner states that all or a substantial portion of the administrative and support personnel who support Petitioner's broker-dealer activities in the office building are located in New York State. All or a substantial portion of BT's administrative and support personnel who support BT's dealer activities in the office building are located in New York State. All or a substantial portion of DB's administrative and support personnel who perform services effectively connected with DB's United States trade or business and who support DB's dealer activities in the office building are located in New York State.

Except for the requirement that it be principally used in activities qualifying for the investment tax credit, it is assumed for purposes of this Advisory Opinion that the office building meets all other requirements for Petitioner to be eligible to claim the investment tax credit, under section 210.12 of the Tax Law, with respect to the building.

### **Applicable law and regulations**

Section 210.12 of the Tax Law contains the provisions for the investment tax credit, and provides, in part:

(a) A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article. The amount of the credit shall be the percent provided for hereinbelow of the investment credit base. The investment credit base is the cost or other basis for federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components of buildings, described in paragraph (b) of this subdivision....

\* \* \*

(b)(i) A credit shall be allowed under this subdivision with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are ... (D) principally used in the ordinary course of the taxpayer's trade or

business as a broker or dealer in connection with the purchase or sale (which shall include but not be limited to the issuance, entering into, assumption, offset, assignment, termination, or transfer) of stocks, bonds or other securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code, or of commodities as defined in section four hundred seventy-five (e) of the Internal Revenue Code... For purposes of clause[s] (D) ... of this subparagraph, property purchased by a taxpayer affiliated with a regulated broker, dealer ... is allowed a credit under this subdivision if the property is used by its affiliated regulated broker, dealer ... in accordance with this subdivision. Provided, however, a taxpayer shall not be allowed the credit provided by clause[s] (D) ... of this subparagraph unless all or a substantial portion of the employees performing the administrative and support functions resulting from or related to the qualifying uses of such equipment are located in this state....

\* \* \*

(d) A taxpayer shall not be allowed a credit under this subdivision with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which it leases to any other person or corporation except where a taxpayer leases property to an affiliated regulated broker, dealer ... that uses such property in accordance with clause (D) ...of subparagraph (i) of paragraph (b) of this subdivision. For purposes of the preceding sentence, any contract or agreement to lease or rent or for a license to use such property shall be considered a lease....

Section 5-2.4(c) of the Business Franchise Tax Regulations (Article 9-A Regulations), contains the definition of the term *principally used*, and provides as follows:

The term *principally used* means more than 50 percent. A building or addition to a building is principally used in production where more than 50 percent of its usable business floor space is used in storage and production. Floor space used for bathrooms, cafeterias and lounges is not usable business floor space. Space used for offices, accounting, sales and distribution is not used in production. Dual purpose machinery is principally used in production when it is used in production more than 50 percent of its operating time.

## Opinion

With respect to LLCs, the classification accorded an LLC for federal income tax purposes will be followed for purposes of Article 9-A of the Tax Law. (See, *McDermott, Will & Emery*, Adv Op Comm T&F, July 24, 1996, TSB-A-96(19)C; *FGIC CMRC Corp*, Adv Op Comm T&F, April 1, 1996, TSB-A-96(11)C; and Department of Taxation and Finance Memorandum, TSB-94(6)I and (8)C, October 25, 1994.) Where a single member LLC is not classified as an entity separate from its owner for federal income tax purposes (a disregarded entity), it is considered a branch or division of its owner for federal income tax purposes, and for purposes of Article 9-A of the Tax Law.

In this case, the office building at 60 Wall Street, New York, New York, is owned by a single member LLC that is treated as a disregarded entity for federal income tax purposes. The sole member of the LLC is Petitioner. Therefore, for purposes of Article 9-A of the Tax Law, the single member LLC is considered a branch or division of Petitioner, and Petitioner is treated as the owner of the office building at 60 Wall Street.

Section 210.12(b)(i) of the Tax Law provides that a taxpayer is allowed an investment tax credit with respect to buildings and structural components of buildings which are principally used in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities as defined in IRC section 475(c)(2), or of commodities as defined in IRC section 475(e), if the property meets all of the other requirements of section 210.12(b)(i) of the Tax Law. This includes the requirement that all or a substantial portion of the employees performing the administrative and support functions resulting from or related to the qualifying uses of such property are located in New York State. Further, section 210.12(b)(i) and (d) of the Tax Law provides that the investment tax credit is allowed with respect to buildings, and structural components of buildings, that are leased by the taxpayer to an affiliated regulated broker or dealer, if the affiliated regulated broker or dealer uses the property in the ordinary course of its trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities as defined in IRC section 475(c)(2), or of commodities as defined in IRC section 475(e).

Technical Services Bureau Memorandum entitled *Tax Credits for the Financial Services Industry*, December 1998, TSB-M-98(8)C, (6)I, provides that the term *affiliate* means:

- 1) a partnership 80% or more of whose interest in the partnership's capital or profits is owned or controlled, directly or indirectly, by the taxpayer;
- 2) a corporation 80% or more of whose voting stock is owned or controlled, directly or indirectly, by the taxpayer;
- 3) a corporation who owns or controls, directly or indirectly, 80% or more of the voting stock of the taxpayer; and
- 4) a corporation 80% or more of whose voting stock is owned or controlled, directly or indirectly, by the entity that owns or controls, directly or indirectly, 80% or more of the voting stock of the taxpayer.

With respect to Issue 1, DB is a dealer that is subject to regulation, supervision and examination by the Federal Reserve Board, and DB's New York branch is also supervised by the New York State Banking Department, both financial services regulators. DB indirectly owns the stock of Petitioner. Following the definition of *affiliate* as provided in TSB-M-98(8)C, (6)I, *supra*, Petitioner and DB are affiliates. For purposes of section 210.12(b)(i) and (d) of the Tax Law, there

is no requirement that the lessee of qualifying property be a domestic corporation or an Article 9-A taxpayer. Petitioner may claim an investment tax credit on property that it leases to DB if the property meets all the requirements of section 210.12 of the Tax Law, including (a) the requirement that the property is principally used in the ordinary course of the taxpayer's or regulated affiliate's trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities or of commodities, and (b) the requirement that all or a substantial portion of the employees performing the administrative and support functions resulting from or related to the qualifying uses of such property are located in New York State.

With respect to Issue 2, BT is a dealer subject to regulation, supervision and examination by both the Federal Reserve Board and the New York State Banking Department, and is also subject to relevant FDIC regulation, all financial services regulators. BT is a corporation that is indirectly owned by DB, an entity that indirectly owns the stock of Petitioner. Following the definition of *affiliate* as provided in TSB-M-98(8)C, (6)I, *supra*, Petitioner and BT are affiliates. For purposes of section 210.12(b)(i) and (d) of the Tax Law, there is no requirement that the lessee of the qualifying property be an Article 9-A taxpayer. Petitioner may claim an investment tax credit on property that it leases to BT if the property meets all the requirements of section 210.12 of the Tax Law, including (a) the requirement that the property is principally used in the ordinary course of the taxpayer's or regulated affiliate's trade or business as a broker or dealer in connection with the purchase or sale of stocks, bonds or other securities or of commodities, and (b) the requirement that all or a substantial portion of the employees performing the administrative and support functions resulting from or related to the qualifying uses of such property are located in New York State.

With respect to Issue 3, Petitioner will be allowed an investment tax credit pursuant to section 210.12(b)(i) and (d) of the Tax Law if the leased property is used by DB and BT, its affiliated dealers which are regulated by financial services regulators, in their regulated dealer activities, and the property meets all of the requirements of section 210.12 of the Tax Law. Therefore, in determining whether tangible personal property or other tangible property, including buildings and structural components of buildings, is principally used in the ordinary course of Petitioner's trade or business as a broker or dealer in connection with the purchase and sale of stocks, bonds, or other securities, or of commodities, it is appropriate to aggregate the qualifying uses by Petitioner and DB and BT, its affiliated regulated dealer lessees, in connection with the purchase and sale of stocks, bonds, or other securities, or of commodities.

In this case, Petitioner owns an office building located at 60 Wall Street, New York, New York. Based on the illustrative percentages presented, Petitioner uses 45 percent of the usable business floor space of the building in its business as a broker-dealer in connection with the purchase or sale of stocks, bonds or other securities or of commodities. Petitioner leases 20 percent of the usable business floor space of the building to DB. One-fourth of the usable business floor space leased by DB (5 percent of the total usable business floor space) is used by DB in its business as a financial services regulated dealer in connection with the purchase or sale of stocks, bonds or other securities or of commodities, and three-fourths is used in other activities. Petitioner also leases 20 percent of the usable business floor space of the office building to BT. One-fourth of the usable

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business floor space leased by BT (5 percent of the total usable business floor space) is used by BT in its business as a financial services regulated dealer in connection with the purchase or sale of stocks, bonds or other securities or of commodities, and three-fourths is used in other activities.

Therefore, if the 10 percent of the total usable business floor space of the building used by DB and BT (5 percent each) in their qualifying activities as regulated dealers is added to the 45 percent of the total usable business floor space of the building used by Petitioner in its activities as a broker-dealer, 55 percent of the building would be used in investment tax credit qualifying activities under section 210.12(b)(i)(D) of the Tax Law. In such case, the office building at 60 Wall Street that is owned by Petitioner would be considered to be principally used by Petitioner in the ordinary course of Petitioner's trade or business as a broker or dealer in connection with the purchase and sale of stocks, bonds, or other securities, or of commodities.

Petitioner states that all or a substantial portion of the administrative and support personnel who support Petitioner's broker-dealer activities in the office building, and who support BT's regulated dealer activities in the office building are located in New York State. Also, all or a substantial portion of DB's administrative and support personnel who perform services effectively connected with DB's United States trade or business and who support DB's regulated dealer activities in the office building are located in New York State. Based on this representation, and assuming all of the other requirements of section 210.12(b)(i) are met with respect to the office building at 60 Wall Street, New York, New York, Petitioner may claim the investment tax credit for the adjusted basis of the building.

DATED: June 15, 2004

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