

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-13(9)C  
Corporation Tax  
September 10, 2013

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION          PETITION NO. C130311A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. (“Petitioner”), [REDACTED]. Petitioner asks whether Petitioner’s shareholders are eligible to claim the investment tax credit (“ITC”) under Tax Law § 606(a) for certain machinery used by Petitioner in its manufacturing division. Based on the facts provided, we conclude that Petitioner’s shareholders are entitled to claim the ITC.

**Facts**

Petitioner is a New York S corporation that operates a granite and marble business. Petitioner purchases raw slabs of marble and granite and prepares those materials for sale to customers as countertops and other custom items. The S corporation contains two divisions. The first division is responsible for sales contracts and product installation; the second division is responsible for converting the raw stone slabs into finished products, countertops and other custom kitchen products, prior to installation. In order to convert the raw stone slabs into countertops and other products, the second division purchased a computer numerical control (CNC) machine that is used to cut, reshape, polish and remove imperfections in the raw stone slabs prior to installation. The finished product is significantly different in color, shape, finish, imperfections etc., to the raw stone purchased by Petitioner. The CNC machine is used exclusively for these purposes.

**Analysis**

For purposes of determining the ITC of a shareholder of a New York S corporation, a shareholder is entitled to claim their pro rata share of the corresponding credit base of the S corporation determined for the corporation’s taxable year ending with or within the shareholder’s taxable year. *See* Tax Law § 606(i)(1)(A). With respect to the ITC, the corporation’s credit base is determined under Tax Law § 210.12. *See* Tax Law § 606(i)(1)(B)(i). Tax Law § 210.12(a) provides that the investment credit base is the cost or other basis for federal income tax purposes of tangible property, including buildings and structural components of buildings which is qualified property under Tax Law § 210.12(b), less certain nonqualified nonrecourse financing with respect to the property. Qualified property is tangible property, including buildings and structural components of buildings, which:

- is acquired, constructed, reconstructed, or erected by the taxpayer;

- is depreciable under IRC § 167 or § 168;
- has a useful life of four years or more;
- is acquired by the taxpayer by purchase under IRC § 179(d);
- is located in New York State; and
- is principally used by the taxpayer in producing goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing. . . . See Tax Law § 210.12(b).

For purposes of this Advisory Opinion, it is presumed that Petitioner has acquired the machinery by purchase under IRC § 179(d), the machinery is depreciable under IRC § 167 or § 168, the machinery has a useful life of four years or more, and the machinery is located in New York State. The only issue to be decided is whether the machinery is principally used by the Petitioner in the production of goods by manufacturing or processing so that the property is considered qualified property.

Machinery is principally used in the production of goods if over 50 percent of its operating time is spent on a qualified activity. See 20 NYCRR § 5-2.4(c). Property used in the production of goods includes machinery, equipment, or other tangible property principally used in the production of goods. See 20 NYCRR § 5-2.4(a) & (b). The term "processing," while not defined in the statutory provision or regulation here at issue, is defined for sales and use tax purposes at 20 NYCRR § 527.4(d) as "the performance of any service on tangible personal property for the owner which effects a change in the nature, shape or form of the property." In *Continental Terminals* (State Tax Commission, TSB-H-82(4)C), the Tax Commission held such definition to be applicable to determinations made under Article 9-A.

In *Continental Terminals*, the taxpayer's machinery comprised a green coffee dump, bucket elevators, a cleaner/scalper, a feeder bin, a roaster and a scale/sewing machine/conveyor combination. The machinery accepted a quantity of green, moldy coffee beans and (1) cleansed the beans to remove foreign matter such as sticks, dust, bugs and string, (2) scalped the beans to uniform size and to remove cracked or rotten beans, (c) moistened the beans to soften any mold existing on them, (d) agitated the beans to remove the mold, (e) lightly roasted the beans into brown beans to prevent mold reformation, and (f) weighed, re-bagged and marked the beans for identification purposes. After the beans went through the machines they were in a clean, semi-roasted form and allowed to be released by the Food and Drug Administration and delivered to commercial roasters and blenders. The Tax Commission held that the taxpayer's machinery effectuated a change in the nature and form of raw materials and it was principally used by the taxpayer in the production of goods by processing.

Relying on the principles in *Continental Terminals* above, Petitioner's machinery that is used to cut, reshape, polish and remove imperfections in the raw stone slabs so as to convert raw slabs into countertops and other custom kitchen products, that are significantly different from the raw material purchased by Petitioner, will qualify as machinery used for processing

in the production of goods for purposes of the ITC. Because Petitioner uses the machinery 100 percent in these processing activities, the equipment will be considered to be principally used in production. Therefore, assuming Petitioner meets all other ITC requirements, Petitioner's machine will be considered qualified property and eligible for the credit.

DATED: September 10, 2013

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.