

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

TSB-A-85 (24) C  
Corporation Tax  
October 16, 1985

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C850826A

On August 26, 1985 a Petition for Advisory Opinion was received from Pasta & Cheese Inc., 21-51 Borden Avenue, Long Island City, New York, New York 11101.

The issue presented is whether Petitioner is a "new business" for purposes of section 210.12(j) of Article 9-A of the Tax Law and thus, is eligible for a refund of unused investment tax credits as provided in section 210.12(e) of the Tax Law.

Petitioner, a domestic corporation, was incorporated on April 16, 1976 and has continued to operate in substantially similar fashion up to the present time. It manufactures food products for distribution on both a retail and wholesale level and makes significant purchases of machinery and equipment for use in the manufacturing process. A portion of this equipment is eligible for the investment tax credit.

On March 11, 1985, Petitioner was involved in a "public offering" at which time approximately 36.5% of its presently outstanding shares of stock were acquired by the general public. Petitioner states that, at that time, effective control of the corporation shifted from the hands of the founding private stockholders to the newly designated Board of Directors.

Petitioner contends that the sale of 36.5 of its outstanding shares of stock represents a substantial change in ownership, thus, making Petitioner a "new business" eligible for a refund of unused investment tax credits.

Section 210.12 of the Tax Law provides for a credit against the tax imposed by Article 9-A based upon a percentage of 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, which:

1. is acquired, constructed, reconstructed or erected by the taxpayer after December 31, 1968;
2. is depreciable pursuant to section 167 of the Internal Revenue Code or recovery property with respect to which a deduction is allowable under section 168 of the Internal Revenue Code;
3. has a useful life of four years or more;
4. is acquired by the taxpayer by purchase as defined in section 179(d) of the Internal Revenue Code;
5. has a situs in New York State; and

6. is principally used by the taxpayer in the production of goods by manufacturing, processing or other specified activities.

Section 210.12(e) of the Tax Law, applicable with respect to taxable years beginning on or after January 1, 1982, provides that where a new business as defined in section 210.12(j) of the Tax Law is entitled to an investment tax credit carryover, it may elect to treat the carryover as an overpayment of tax to be refunded.

Section 210.12(j) of the Tax Law, in pertinent part, provides that a new business shall include any corporation, except a corporation which:

"...(2) is substantially similar in operation and in ownership to a business entity (or entities) taxable, or previously taxable, under this article;..."

Petitioner has stated that the operation of its business has continued in substantially similar fashion from its incorporation in 1976 up to the present time. In addition, the founding private stockholders of Petitioner continue to hold 63.5% of its shares of stock. Although there is a newly designated Board of Directors, the founding private shareholders have retained a controlling interest in Petitioner. Accordingly, Petitioner is a corporation which is substantially similar in operation and in ownership to a business entity taxable under Article 9-A of the Tax Law and, thus, is not a "new business" for purposes of section 210.12(j) of the Tax Law. Petitioner may not elect to treat an investment tax credit carryover as an overpayment of tax to be refunded. However, pursuant to section 210.12(e) of the Tax Law, Petitioner may continue to carry over the investment tax credit to the following year or years to be deducted from its tax for such year or years.

DATED: October 15, 1985

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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