STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C940815A

On August 15, 1994, a Petition for Advisory Opinion was received from Flexovit USA, Inc., 1305 Eden Evans Center Road, Angola, New York 14006.

The issues raised by Petitioner, Flexovit USA, Inc., are (1) whether receipts from sales where the buyer controls the shipment of the items are allocable to New York when computing the receipts factor of the business allocation percentage under section 210.3(a) of the Tax Law and (2) whether certain repairs in a manufacturing facility would qualify for investment tax credit under section 210.12 of the Tax Law.

With respect to issue "1", Petitioner's customer has a contract with a trucking company (common carrier) to pick up material at Petitioner's factory located in New York State. The customer exercises complete control over the trucking company. The customer arranges for pickup, provides the place, date and time shipment must be at the destination (all outside of New York) and also makes payment.

Section 210.3(a)(2)(A) of the Tax Law provides that, for purposes of computing the receipts factor of the business allocation percentage, receipts from sales of tangible personal property are allocated to New York State where shipments are made to points within New York State.

Further, section 4-4.2 of the Business Corporation Franchise Tax Regulations (Corporation Regulations) states:

> Receipts from sales of tangible personal property are allocable 100 percent to New York State where shipments are made to points in this State. Tangible personal property is considered to be shipped to a point in New York State if:
>
> (a) the property is shipped via common carrier or via taxpayer's truck to a point in New York State designated on the bill of lading or other shipping document, regardless of the F.O.B. point; or
>
> (b) the property is delivered to a purchaser at a point in New York State.
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> **Example 1:** A taxpayer has its factory in New York State. A customer located in New Jersey comes into New York State in its own truck or one rented

> by it and picks up its purchase at the taxpayer's factory. The receipts from such sale must be allocated to New York State.

In W.A. Krueger Company, Adv Op St Tax Comm, May 29, 1987, TSB-A-87(13)C, it was held that where books, magazines and catalogs are shipped by the petitioner to it customers located in New York State or to designees of its customers located in New York State, in bulk, via common carrier or through the mails, the receipts from such sales are properly allocated to New York State and must be included in the numerator of the petitioner's receipts factor.

In Swanknit Inc., Adv Op Comm T & F, October 18, 1993, TSB-A-93(18)C, it was held that where the petitioner manufactured clothing that it shipped via common carrier to its customers or its customer's designees throughout the United States, the receipts from the sales where such shipments are to points within New York State must able included in the numerator of the petitioner's receipts factor.

Unlike Krueger, supra and Swanknit, supra, where the manufacturer is shipping the merchandise, herein it is the customer who contracts with the common carrier, exercises complete control over the common carrier, arranges for pickup of the material at Petitioner's factory in New York State, provides the place, date and time shipment must be at the destination outside New York and pays for such shipment. In such instances, the customer is shipping the material, not Petitioner.

Where Petitioner's customer is shipping the material from Petitioner's factory in New York State, Petitioner's customer is taking delivery at Petitioner's factory in New York State. This situation is the same as Example 1 of section 4-4.2 of the Corporation Regulations where the customer is taking delivery of the material-sold by the seller at the seller's factory in New York State and does its own shipping.

Accordingly, pursuant to section 210.3(a)(2)(A) of the Tax Law and section 4-4.2(b) of the Corporation Regulations, Petitioner's sales of material to customers where the customer takes delivery of the material at Petitioner's factory in New York State are allocable to New York State and must be included in the numerator of the receipts factor for purposes of computing the business allocation percentage. The denominator of the receipts factor must include the receipts from all sales of Petitioner's material.

With respect to Petitioner's second issue, section 210.12 of the Tax Law allows an investment tax credit against the tax imposed under Article 9-A of the Tax Law. For taxable years beginning after 1990, section 210.12 allows an investment tax credit equal to five percent with respect to the first $350 million of the investment credit base. The investment credit base is the cost or other basis for Federal income tax purposes of qualified tangible personal property and other tangible property, including buildings and structural components of buildings.

Section 5-2.1 of the Corporation Regulations provides that the taxpayer must claim the investment tax credit for the first taxable year in which the property becomes qualified property.

Under section 5-2.2 of the Corporation Regulations, the term "qualified property" means tangible personal property and other tangible property, including buildings and structural components of buildings, which:

(1) are acquired, constructed, reconstructed or erected after 1990;
(2) are depreciable pursuant to section 167 of the Internal Revenue Code;
(3) have a useful life of four years or more;
(4) are acquired by purchase as defined in section 179(d) of the Internal Revenue Code;
(5) have a situs in New York State; and
(6) are principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing.

The terms "buildings" and "structural components of buildings" are not defined for purposes of section 210.12(b) of the Tax Law or section 5-2.2 of the Corporation Regulations.

Section 1-2.1 of the Corporation Regulations provides that, unless a different meaning is clearly required, any term used in the Corporation Regulations presumably has the same meaning as when used in a comparable context in the IRC and the Corporation Regulations promulgated thereunder. Herein, the terms "buildings" and "structural components of buildings" as used in section 210.12(b) of the Tax Law are parallel to those terms used for determining "section 38 property" for purposes of computing investment credit under section 46 of the IRC. Therefore, when determining the meaning of buildings and structural components of buildings for purposes of section 210.12(b) of the Tax Law and section 5-2.2 of the Corporation Regulations, it is appropriate to apply the definitions used for computing investment credit for Federal income tax purposes.

In section 1.48-1(e)(1) of the Treasury Regulations, the term "building" is defined as generally meaning any structure or edifice enclosing a space within its walls, and usually covered by a roof, the purpose of which is, for example, to provide shelter or housing, or to provide working, office, paring, display, or sales space. The term includes, for example, structures such as factory buildings and warehouses.

In section 1.48-1(e)(2) of the Treasury Regulations, the term "structural components" includes such parts of a building as walls, partitions, floors, and ceilings, as well as any permanent coverings therefor such as paneling or tiling; windows and doors; all components (whether in, on, or adjacent to the building) of a central air conditioning or heating system, including motors, compressors, pipes and ducts; plumbing and plumbing fixtures, such as sinks and bathtubs;

electric wiring and lighting fixtures; chimneys; stairs, escalators, and elevators, including all components thereof; sprinkler systems; fire escapes; and other components relating to the operation or maintenance of a building.

Accordingly, for purposes of section 210.12(b) of the Tax Law, buildings and structural components of buildings include such items as a roof, windows and a shipping dock. However, the determination of whether roof repairs, window replacement and shipping dock repairs in a manufacturing facility would constitute qualified property for purposes of the investment tax credit under section 210.12 of the Tax Law is a factual matter. To be qualified property, such repairs and replacements must be depreciable pursuant to section 167 of the IRC, have a useful life of four years or more, be acquired by the taxpayer by purchase as defined in section 179(d) of the IRC and meet the other requirements of section 5-2.2 of the Corporation Regulations.

It is not within the scope of an Advisory Opinion to determine questions of fact. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts." Tax Law, 171.Twenty-fourth; 20 NYCRR 2376.1(a).

Note, that when determining whether, for purposes of section 210.12 of the Tax Law, property is depreciable pursuant to section 167 of the IRC, guidance is contained in section 1.167(a)-ll(d)(2) of the Treasury Regulations. Such section 1.167(a)-ll(d)(2) provides that, in general, under sections 162, 212 and 263 of the IRC, expenditures which substantially prolong the life of an asset or materially increase its value or adapt it for a substantially different use are capital expenditures. If an expenditure is treated as a capital expenditure under section 162, 212 or 263 of the IRC, it is subject to the allowance for depreciation under section 167 of the IRC. Expenditures which do not substantially prolong the life of an asset or materially increase its value or adapt it for a substantially different use may be deducted as an expense in the taxable year in which paid or incurred. Such expenditures are not depreciable.

DATED: December 27, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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