STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C941003A

On October 3, 1994, a Petition for Advisory Opinion was received from Empire Recycling Corporation, P.O. Box 353, Utica, New York 13503.

The issue raised by Petitioner, Empire Recycling Corporation, is whether it is considered a manufacturer or processor for purposes of the New York State investment tax credit under section 210.12 of the Tax Law.

Petitioner has a division which operates a paper processing and recycling center. Its primary market for the processed material is the repulping paper making industry. Each grade of paper must fit exacting standards of quality and size as prescribed by the consuming mill. Each stage of the grading, separating, fluffing, baling and packing process is designed to maximize output while maintaining the highest fibre quality standards, thereby preventing downgrading or rejection.

The majority of the fifteen grades of paper processed by Petitioner arrives at the factory in a mixed or combined state. When the material arrives at Petitioner's plant, it is dumped on a "tipping floor". The material is then moved from the "tipping floor" to three sorting conveyors by use of small loaders. The three sorting conveyors transport the material past sorters. The conveyor belts' speed and carrying capacity are constantly maintained at the sorting control panel. The sorters' job is to separate the material, often previously bound together, into various designated chambers depending on fibre, color and type. Once the material has been sorted into its designated chamber it is given a chemical test to determine if it is acidic, groundwood or alkaline. Material here is also visually inspected to determine that it has been properly sorted and has the designated characteristics of fiber, color and type. Once the paper has been properly graded, it is ready for fluffing and baling.

Bale integrity is as important as the fiber quality. Uniform dimensions, weight, density and banding style are the key characteristics evaluated on a bale by bale basis. The material that passes the fibre quality tests can and is rejected for poor bale characteristics.

The main components of the baling process are feeding, conditioning and baling. These functions are automatically controlled by the baler computer to insure paper feed rate, conditioning, compaction and bale strapping frequency.

The baling process is preceded by fluffing the material. The fluffer conditioner reduces oversize sheets of paper stock to specified sizes by cutting the sheets of paper stock while on the bale line. The fluffer/conditioner insures that the paper meets factory standards, and that maximum density and uniformity are achieved in each bale. This technology allows Petitioner to customize, on a grade by grade basis, to match individual mill specifications without sacrificing quality or output.

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 and four percent with respect to the investment credit base in excess of $350 million. 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 Business Corporation Franchise Tax 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 Business Corporation Franchise Tax Regulations, the term "qualified property" means 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;

(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, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing.

Section £10.12(b)(ii)(A) of the Tax Law provides that the term "manufacturing" shall mean "the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment."

Section 5-2.4(c) of the Business Corporation Franchise Tax Regulations provides that

> [t]he 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.

Petitioner operates a paper processing business for the repulping paper making industry. Petitioner's paper grading, separating, fluffing, baling and packing process, described herein, constitutes the production of goods by manufacturing or processing pursuant to section 210.12(b)(ii)(A) of the Tax Law. If Petitioner's machinery and equipment is principally used for such manufacturing or processing purpose, such machinery and equipment will qualify for the investment tax credit if the machinery and equipment meets all of the other requirements contained in section 210.12 of the Tax Law and Subpart 5-2 of the Business Corporation Franchise Tax Regulations.

DATED: January 26, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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