

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

TSB-A-88 (5) I  
Income Tax  
April 29, 1988

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I880127A

On January 27, 1988, a Petition for Advisory Opinion was received from Newport Hydro Associates, 114 State Street, Boston, Massachusetts 02109.

The issue raised is whether for personal income tax purposes the general partners and the corporate limited partner of Petitioner may claim an investment tax credit, pursuant to section 606(a)(1) of the Tax Law, with respect to Petitioner's investment in equipment to be used in a hydroelectric facility that will manufacture electric energy.

Petitioner is a New York limited partnership. Petitioner will build a hydroelectric power plant ("facility") in the Village of Newport, in Herkimer County, New York to manufacture electric energy. Petitioner is developing the facility in accordance with the terms of a lease agreement with the Village of Newport which is granting development rights to Petitioner.

The facility, which will be built at the site of an existing dam, will utilize two Voith Hydro, Inc. horizontal Mini-Pit turbine/generators and a minimum flow turbine generator. The equipment will be acquired by purchase as defined in section 179(d) of the Internal Revenue Code. The property will be depreciable pursuant to section 167 of the IRC and have a useful life of more than four years. Petitioner believes that the equipment will be principally used in the production of goods by manufacturing. The facility will manufacture approximately 7.8 million KWH of electric energy per year. The electric power from the facility will be transmitted to an existing substation located adjacent to the powerhouse for delivery to and purchase by Niagara Mohawk Power Corporation.

Section 601(f) of Article 22 of the Tax Law and section 119.1 of the New York State Personal Income Tax Regulations (hereinafter "Income Tax Regulations") provide that a partnership itself does not pay a New York State personal income tax, but the individual partners are taxed on their respective distributive shares of the partnership income, whether or not such shares are actually distributed to them.

Section 606(a) of the Tax Law allows an investment tax credit against the ordinary tax imposed by Article 22 of the Tax Law with respect to certain tangible property. Under Article 9-A of the Tax Law, corporations are allowed an investment tax credit pursuant to section 210.12(a), against the tax imposed under Article 9-A. Such investment tax credit provisions are essentially the same as the investment tax credit provided under section 606(a) and the qualifying requirements under both section 210.12(a) and section 606(a) are identical.

Section 606(a) and section 103.1(c)(1) of the Income Tax Regulations define property which qualifies for the investment tax credit as tangible personal property and other tangible property, including buildings and structural components of buildings, which:

"(i) is acquired, constructed, reconstructed or erected by the taxpayer after December 31, 1968;

(ii) is depreciable pursuant to section 167 of the Internal Revenue Code or is recovery property with respect to which a deduction is allowable under section 168 of the Internal Revenue Code;

(iii) has a useful life of four years or more;

(iv) is acquired by the taxpayer by purchase as defined in subsection (d) of section 179 of the Internal Revenue Code;

(v) has a situs in New York State; and

(vi) 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 606(a) clearly requires that all of the above criteria be met before an investment tax credit is allowed. Petitioner states that the property purchased by the partnership will satisfy the requirements of criteria (i), (ii), (iii) and (v) above. Therefore, the criteria at issue herein are whether the property is acquired by the taxpayer (partner) by purchase as defined in section 179(d) of the Internal Revenue Code and whether such property is principally used by the taxpayer (partner) in the production of goods by manufacturing, processing, assembling, etc.

Tangible property that a partnership purchases, as defined in section 179(d) of the Internal Revenue Code, is deemed to be purchased by each partner to the extent of the partner's distributive share of the partnership's property. Accordingly, tangible property that is deemed to be purchased by a partner pursuant to section 179(d) of the Internal Revenue Code will be deemed to be acquired by purchase by the taxpayer (partner) for purposes of section 606(a) of the Tax Law.

Section 606(a)(2)(B)(i) provides that "manufacturing" means 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.

The New York State Tax Commission has defined "processing" as an operation whereby raw material is subjected to some special treatment, either artificially or naturally, which results in a transformation or alteration of the raw material's form,

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state or condition (Matter of Hudson Cold Storage and Freezer Corp., State Tax Commission, September 9, 1983, TSB-H-83(40)C).

The language of section 606(a)(2) and section 210.12(b) indicates that the investment tax credit was intended for machinery and equipment used principally in the production of goods. Such sections also intended that the manufacturing process include working raw materials thereby giving new shape, quality or combinations to matter. Herein, Petitioner's hydroelectric power plant will generate electric energy that is neither goods nor matter as those terms are used in section 606(a)(2) and section 210.12(b). Therefore, Petitioner's activities do not constitute the production of goods by manufacturing, processing etc. as required by section 606(a) and section 210.12.

Accordingly, individual partners of Petitioner will not be allowed an investment tax credit pursuant to section 606(a) of the Tax Law against the tax imposed under section 601 for its distributive share of the cost or other basis of the tangible personal property used to generate electric energy.

In addition, a corporate partner of Petitioner will not be allowed an investment tax credit, pursuant to section 210.12(a), against the tax imposed under Article 9-A for its distributive share of the cost or other basis of the tangible personal property used to generate electric energy.

DATED: April 29, 1988

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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