

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

TSB-A-88 (2) I  
Income Tax  
March 21, 1988

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. 1871229A

On December 29, 1987, a Petition for Advisory Opinion was received from Keith and Gloria Wilson, 1090 Atlantic Avenue, Rochester, New York 14609.

The issue raised is whether, under Article 22 of the Tax Law for taxable years 1984, 1985 and 1986, an investment tax credit is allowed for the equipment used in a frozen custard business.

Petitioner is in the business of making and selling at retail, frozen custard. Petitioner argues that the frozen custard mix cannot be sold at retail until it is processed. This process includes the use of the equipment on which Petitioner has claimed the investment tax credit. Petitioner asserts that the equipment used gives the custard mix a new shape and a new quality that is an essential step in selling the product.

Section 606(a) of the Tax Law provides for a credit against the personal income tax imposed by Article 22 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 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 or other specified activities.

This section defines "manufacturing" for the purposes of the credit as, "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."

In an Advisory Opinion of the State Tax Commission issued to Anthony J. Pieragostini on September 26, 1986 (TSB-A-86(12)I), the Tax Commission determined the following:

Kitchen equipment principally used to prepare food served in a restaurant is ineligible for the investment tax credit because the preparation of food in a restaurant does not constitute the production of goods as contemplated by New York State Tax Law. The word "processing" refers to a type of industrial activity related to manufacturing and not to the preparation of food to be served in a restaurant. See: John F. and Sarah Mahoney, Decision of the State Tax Commission, April 1, 1976; General Mills Restaurant Group, Inc., Decision of the State Tax Commission, November 9, 1984, TSB-H-84(55)C. Take-out restaurants and catering services are similarly ineligible for the investment tax credit. Technical Services Bureau Memorandum TSB-M-78(1)C, April 7, 1978.

Specifically with respect to frozen custard, the State Tax Commission determined that, for purposes of the investment tax credit under Article 9-A of the Tax Law, the preparation of a frozen custard product for retail sale constituted the preparation of food for retail sale and, therefore, such activity did not constitute the production of goods by processing within the meaning of section 210.12(b) of the Tax Law and the equipment principally used for such activity did not qualify for the investment tax credit. Matter of JTR Specialties, Inc., Decision of the State Tax Commission, March 13, 1987, TSB-H-87(12)C.

For purposes of the investment tax credit, section 606(a) of Article 22 is substantially similar to section 210.12 of Article 9-A. Where, the language of statutes are similar, such statutes should be construed the same and the determinations made thereunder should be construed the same.

Accordingly, it is clear that Petitioner is not allowed an investment tax credit, under Article 22 of the Tax Law, on the equipment used in the making of frozen custard for retail sale.

DATED: March 21, 1988

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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