

DISC EXPORT CREDIT

Questions have arisen on the effect of the United States Supreme Court decision in the matter of Westinghouse Electric Corp. v. Tully (80 L Ed 2d 388, 104 S Ct 1856). In that case, the court held that the DISC export credit for New York State franchise tax purposes violated the commerce clause of the U.S. Constitution.

The case was remanded to the New York Court of Appeals (63 NY 2nd 191). The Court of Appeals held that Section 210.13(a)(2) and (3) were unconstitutional. The remainder of Section 210.13 was held to be valid; thus, the DISC export credit was extended to all the DISC income attributable to a parent corporation, regardless of whether or not the DISC activity was within New York State.

Therefore, corporate taxpayers that computed the DISC export credit on the income from DISC sales where shipments were made from points within New York State are now entitled to recompute their credit. The DISC export credit may be recomputed for all taxable periods for which the limitations included in Section 1087 of the Tax Law have not expired. Further, corporate taxpayers which have not previously claimed the DISC export credit may now do so, for all taxable periods for which the limitations included in Section 1087 of the Tax Law have not expired.

While the Appellate Division, in its June 29, 1981 decision, stated that Section 209(i)(B) of the Tax Law was unconstitutional to the extent that it required a DISC's accumulated income to be added to the income of a shareholder, the United States Supreme Court and the Court of Appeals decisions centered on the unconstitutionality of the DISC export credit. The requirement that a DISC's accumulated income be added to the income of a shareholder was held to be constitutional.

The addition of a DISC's accumulated income to the income of a shareholder and the allowance of a DISC export credit are so integrally related that a claim for refund based on either issue may properly include full consideration of the other (Metropolitan Life Insurance Company, State Tax Commission decision, March 17, 1982). Accordingly, in cases where previous claims for refund were properly submitted, based on the rationale of the decision of the Appellate decision, although such claims are subject to denial as refunds based on the unconstitutionality of taxing accumulated earnings, these claims will be deemed proper claims for refund based on recomputation of the DISC export credit. As such, it will not be necessary for those taxpayers to submit amended claims for refund. Further, in such instances, properly submitted claims based on the Appellate Division's decision may only go back to the years in statute at the time those claims were filed.