New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(10)C
Corporation Tax
October 10, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C030520B

On May 20, 2003, a Petition for Advisory Opinion was received from Morgan Stanley & Co. Incorporated, 1585 Broadway, New York, New York 10036.

The issue raised by Petitioner, Morgan Stanley & Co. Incorporated, is whether a substantial portion of its employees performing administrative and support functions are located in New York State for purposes of qualification for the investment tax credit under section 210.12 of Article 9-A of the Tax Law.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a global financial services firm that provides investment banking, sales and trading services to domestic and international corporate, government, and other institutional clients through its various subsidiaries. Petitioner conducts its business from its headquarters in New York City, its regional offices and branches throughout the United States, and its principal offices located in financial centers worldwide. Petitioner is registered as a broker-dealer with the Securities and Exchange Commission and is a member of various self-regulatory organizations, including the National Association of Securities Dealers, Inc. and various securities exchanges, including the New York Stock Exchange, Inc.

Petitioner and its affiliates make purchases of property that potentially qualify for the New York State investment tax credit for broker-dealers and investment advisors. Petitioner estimates that, during the fiscal year ending November 30, 2003, between 87 percent and 92 percent of the administrative and support personnel employed by Petitioner who support Petitioner's employees using the property that potentially qualifies for the investment tax credit will be located in New York State.

Applicable law and regulations

Section 210.12 of the Tax Law contains the provisions for the investment tax credit, and provides in pertinent part:

> (a) A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article....

* * *

(b)(i) A credit shall be allowed under this subdivision with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are ... (D) principally used in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale (which shall include but not be limited to the issuance, entering into, assumption, offset, assignment, termination, or transfer) of stocks, bonds or other securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code, or of commodities as defined in section four hundred seventy-five (e) of the Internal Revenue Code, (E) principally used in the ordinary course of the taxpayer's trade or business of providing investment advisory services for a regulated investment company as defined in section eight hundred fifty-one of the Internal Revenue Code, or lending, loan arrangement or loan origination services to customers in connection with the purchase or sale (which shall include but not be limited to the issuance, entering into, assumption, offset, assignment, termination, or transfer) of securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code, or (F) principally used in the ordinary course of the taxpayer's business as an exchange registered as a national securities exchange within the meaning of sections 3(a)(1) and 6(a) of the Securities Exchange Act of 1934 or a board of trade as defined in section 1410(a)(1) of the New York Not-for-Profit Corporation Law or as an entity that is wholly owned by one or more such national securities exchanges or boards of trade and that provides automation or technical services thereto. For purposes of clauses (D), (E) and (F) of this subparagraph, property purchased by a taxpayer affiliated with a regulated broker, dealer, national securities exchange or board of trade, is allowed a credit under this subdivision if the property is used by its affiliated regulated broker, dealer, national securities exchange or board of trade in accordance with this subdivision. Provided, however, a taxpayer shall not be allowed the credit provided by clauses (D), (E) and (F) of this subparagraph unless all or a substantial portion of the employees performing the administrative and support functions resulting from or related to the qualifying uses of such equipment are located in this state....

* * *

(m)(1)(i) If a taxpayer is required by paragraph (g) of this subdivision to add back a portion of the credit taken because property was destroyed or ceased to be in qualified use as a direct result of the September eleventh, two thousand one terrorist attacks, such taxpayer may elect to defer the amount to be recaptured for all such property to the taxable year next succeeding the taxable year in which the destruction or cessation of qualified use occurred. The taxable year in which the destruction or

> cessation of qualified use occurred shall be hereinafter referred to as the "recapture event taxable year". If the taxpayer's total employment number in the state on the last day of the taxable year next succeeding the recapture event taxable year is a *significant percentage* of the taxpayer's average total employment number in the state for the taxpayer's recapture event taxable year and the two taxable years immediately preceding the recapture event taxable year, then the taxpayer shall not be required to recapture any credit with respect to such property.... (emphasis added)

Section 5-2.4(c) of the Business Corporation Franchise Tax Regulations (Article 9-A Regulations) provides, in pertinent part: "The term *principally used* means more than 50 percent...."

Opinion

Before a taxpayer may claim an investment tax credit pursuant to section 210.12(b)(i)(D), (E) or (F) of the Tax Law, all or a substantial portion of its employees performing the administrative and support functions resulting from or related to the qualifying uses of the property must be located in New York State. To meet this requirement, a taxpayer must maintain a requisite number of employees performing administrative and support functions in New York State in the taxable year for which the investment tax credit is claimed.

Technical Services Bureau Memorandum entitled *Tax Credits for the Financial Services Industry*, December 1998, TSB-M-98(8)C, (6)I, provides that employees performing administrative and support functions, for purposes of section 210.12(b)(i)(D), (E) and (F) of the Tax Law, include all employees other than the brokers, dealers, or investment advisors engaged in the qualifying usage of the property for which the investment tax credit may be claimed. Generally, any employee whose compensation for the taxable year is based more than 50 percent on commissions will be presumed to be a broker, dealer, or investment advisor.

An acceptable method of determining whether a taxpayer has maintained a requisite number of employees performing the administrative and support functions in New York State in the taxable year for which the investment tax credit is claimed is the 95 percent employment method, which is described in TSB-M-98(8)C, (6)I, *supra*. Under the 95 percent employment method, a taxpayer is presumed to maintain the requisite number of employees if the average number of employees performing these functions in New York State during the taxable year for which the investment tax credit is claimed is equal to or greater than 95 percent of the average number of employees performing these functions in New York State during the 36 months immediately preceding the year for which the investment tax credit is claimed. If a taxpayer does not compensate employees who are employed as brokers, dealers, or investment advisors on a commission basis, the taxpayer must specifically identify the employees performing those functions and must exclude those employees from the employment percentage calculation. The average number of employees must be computed

on a quarterly basis. A taxpayer may employ an alternate method to determine eligibility. The use of an alternate method must be demonstrated to the Department of Taxation and Finance as an appropriate method.

In this case, Petitioner is not using the 95 percent employment method safe harbor rule, contained in TSB-M-98(8)C, (6)I, *supra*, to determine whether all or a substantial portion of its employees performing the administrative and support functions resulting from or related to the qualifying uses of equipment qualifying for the investment tax credit are located in this state. Instead, Petitioner has asked whether it would meet the requirement, under section 210.12(b)(i)(D), (E) and (F) of the Tax Law, that "all or a substantial portion of the employees performing the administrative and support functions resulting from or related to the qualifying uses of such equipment are located in this state" if between 87 percent and 92 percent of its employees performing the administrative and support functions are located in New York State during the taxable year for which the investment tax credit is claimed.

Under the investment tax credit provisions of section 210.12 of the Tax Law, the term *principally* as used under section 210.12(b) of the Tax Law means more than 50 percent. See section 5-2.4(c) of the Article 9-A Regulations. The phrase *significant percentage* as used under section 210.12(m)(1)(i) of the Tax Law with respect to the employment test applicable to taxpayers that elect to defer the recapture of the investment tax credit is interpreted to mean at least 75 percent pursuant to Technical Services Bureau Memorandum entitled *Investment Tax Credit (ITC) Relief for Property Destroyed as a Direct Result of the Terrorist Attacks of September 11, 2001 (Articles 9-A, 22 32, and 33)*, September 23, 2002, TSB-M-02(3)C, (7)I.

However, the phrase *all or a substantial portion* as used within the context of section 210.12(b)(i)(D), (E) and (F) of the Tax Law is not defined in the Tax Law or regulations. It is reasonable to interpret the phrase *all or a substantial portion* to mean that at least 80 percent of the taxpayer's employees performing the administrative and support functions during the taxable year that support the taxpayer's broker, dealer, and investment advisor employees that use the property qualifying for the investment tax credit under section 210.12(b)(i)(D), (E) and (F) of the Tax Law are located in New York State.

Petitioner estimates that for fiscal year ending November 30, 2003, between 87 percent and 92 percent of the administrative and support personnel employed by Petitioner who support its employees using the property that potentially qualifies for the investment tax credit will be located in New York State. Accordingly, it appears that all or a substantial portion of Petitioner's employees performing the administrative and support functions resulting from or related to the qualifying property that is principally used by Petitioner in the ordinary course of its trade or business as a broker-dealer, or as an investment advisor, for purposes of section 210.12 of the Tax Law, will be located in New York State.

However, whether Petitioner actually qualifies for the investment tax credit is a question of fact not susceptible of determination in an advisory opinion. 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). The necessary factual determination would have be made within the context of an audit in accordance with the principles outlined above.

DATED: October 10, 2003

/s/
Jonathan Pessen
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Technical Services Division

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