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

TSB-A-06(5)C
Corporation Tax
July 26, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C020206A

On February 6, 2002, a Petition for Advisory Opinion was received from American Broadcasting Companies, Inc., c/o Tax Department, 500 Park Avenue, 9th Floor, New York, New York 10022. Petitioner, American Broadcasting Companies, Inc., has provided additional information with respect to the Petition; the latest information was received on July 19, 2005.

The issue raised by Petitioner is whether the master tapes of certain television programs produced by Petitioner are eligible for the investment tax credit ('ITC') 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 produces and distributes live and taped television programming and operates the ABC Television Network. During the years 1991, 1992, 1993 and 1995 through 1999, Petitioner produced, in its studios and other facilities in New York City, master tapes of certain television programs with respect to which ITC was claimed on its timely filed refund claims. No refund claim was filed on programs produced and initially broadcast in 1994. The ITC was claimed on the master tapes of all episodes of the following programs produced in 1991, 1992, 1993 and 1995 through 1999:

All My Children
One Life To Live
Good Morning America
Primetime Live
20/20
Barbara Walters Specials
Peter Jennings Specials.

The ITC was claimed on the master tapes of all episodes of the following program produced in 1993 and 1995:

Day One.

The ITC was also claimed on the master tapes of all episodes of the following program produced in 1997, 1998 and 1999:

John Stossel Specials.

In addition, the ITC was claimed on the master tapes of all episodes of the following programs produced in 1999:

Cynthia McFadden Specials
Nancy Snyderman Specials
The Century.

The episodes of All My Children and One Life To Live produced in the above mentioned years are hereafter referred to as the "Soap Programs." The episodes of the other programs listed above are hereafter referred to as the "News Programs." The Soap Programs and the News Programs are hereafter collectively referred to as the "Programs."

The news magazines and specials with respect to which the ITC was claimed primarily involved news stories that were not purely "hard" news. Petitioner did not claim ITC on its hard news programs such as World News Tonight with Peter Jennings.

The master tapes of the Soap Programs and the News Programs are hereafter referred to as the "Soap Program Masters" and the "News Program Masters," respectively, and collectively as the "Program Masters."

Petitioner states that the Soap Programs have been produced and exploited by Petitioner for more than 20 years before 1991. Primetime Live, Peter Jennings and Day One were first produced and exploited by Petitioner in 1989, 1990, and 1993, respectively. The other News Programs have been produced and exploited by Petitioner for more than 15 years before 1991.

Petitioner states that it has always retained ownership and physical possession of the Program Masters. The Program Masters were produced in Petitioner's studios and post-production facilities in New York City. With respect to the News Program Masters, certain footage may have originated outside of New York, but was transmitted by satellite to Petitioner's facilities in New York where it was edited and incorporated into the final News Program Master. The Program Masters were physically located in New York City in Petitioner's tape libraries or other facilities during the relevant years for which the ITC was claimed.

The Program Masters enabled Petitioner to make duplicate copies of the Programs. Some duplicate copies were in turn used to make other duplicate copies. The duplicate copies were used for a variety of purposes. One of the duplicates became the network television broadcast copy. Duplicate copies of the Program Masters were also made for other purposes such as copies to be provided to domestic and foreign broadcasters, copies for retention in Petitioner's tape libraries (along with the Program Masters and broadcast copies), copies for production staff and talent, copies for West Coast transmission feeds which may require different commercial integration, copies for review by Petitioner's legal department when necessary, etc. All of these duplicates were made in New York.

Petitioner states that the Program Masters were and continue to be used by Petitioner to generate revenue. The network television broadcast copy was edited in order to integrate commercials, promotional announcements and graphics. One or more duplicates of the edited broadcast copy were then made for the purpose, among other things, of having a backup available in the event a problem occurred with the edited broadcast copy during the actual broadcast. The Program was then broadcast by means of a signal transmitted to a satellite from Petitioner's New York transmission facilities. Petitioner derived revenue from the sale of national advertising on each Program and that advertising was broadcast during commercial time spots within the Programs. In some cases, the Programs were broadcast a second time, generally in the year following the initial broadcast.

In addition, Petitioner actively engaged in the syndication of the Programs deriving further revenue from this activity. Through an affiliated company, it entered into agreements with foreign and domestic broadcasters who acquired the right to broadcast one or more of the duplicate tapes of the Programs in their local markets for a limited term. Generally, free television networks and television stations, cable networks and companies operating cable systems ("Other Broadcasters") acquired these duplicate tapes.

Petitioner's syndication business for the Programs begins with the Program Masters. Petitioner or its affiliated distribution company provides duplicates to Other Broadcasters reproduced from either the Program Masters or duplicates thereof. In some cases, a duplicate was provided to a local distributor from which additional duplicates were reproduced. The Program may need to be dubbed into the local language and the duplicate provided to the distributor or Other Broadcaster would be used for this purpose. The Program Masters formed the basis of this activity because, without them, no duplicates could be reproduced and provided to Other Broadcasters.

Petitioner believes that its ability to generate revenue from the Program Masters following the initial network television broadcast is due not only to the efforts of Petitioner but also to those of its affiliated companies, including its parent. The group sought and continues to seek to promote the Programs and increase the value of the Program Masters and related brand names.

The costs incurred in producing the Programs were capitalized into the cost of the Program Masters. The following are descriptions of typical capital costs that were depreciated under section 167 of the Internal Revenue Code (IRC) on Petitioner's federal income tax return:

House Services – includes production studio costs, production and post-production services, graphics costs, newsgathering costs and equipment depreciation costs all of which are provided by other ABC business units.

Broadcast Production Services – includes studio rents, equipment rental costs such as lighting equipment, ENG cameras, booms, hand-held cameras and other technical

equipment, maintenance and repairs on studios and equipment and other production and post-production service charges such as video editing and audio sweetening from unrelated entities.

Other Direct Costs – includes print costs, stock footage costs, props, travel costs, production support services, news coverage expenses, advertising, film processing research, music services and miscellaneous expenses.

Salaries and Benefits – includes compensation (salaries and other benefits) paid for talent and production employees (engineers and other technical workers and production personnel, including directors, writers, producers and their assistants) and payments to professional service corporations for production and talent services.

Telecommunication Costs – includes domestic and foreign uplink and downlink satellite costs and telephone costs.

Music License Fees – includes fees paid to BMI and ASCAP for the use of music in the programs.

Departmental Costs – includes executive and administrative management costs of the TV Network business unit including benefits, supplies and office equipment costs of TV Network management and administrative support groups.

Allocated Services – includes an allocable share of building and office space costs, information system costs, telephone, cleaning services, utilities and other similar facility costs.

For federal income tax purposes, the Soap Program Masters were depreciated using a modified income forecast method under section 167 of the IRC pursuant to which Petitioner recovers its cost over two years. This method provided Petitioner with annual depreciation deductions equal to 95 percent and 5 percent of the cost, respectively, beginning in the year in which the Soap Program Masters were placed in service. The Internal Revenue Service only required Petitioner to include in the income forecast fraction each year anticipated revenue from arrangements that have been entered into with other parties by the end of the year with respect to which the depreciation deduction is computed. Petitioner was not required to depreciate the Soap Program Masters for federal income tax purposes over the actual period during which the revenue was generated.

The income forecast method, under section 167 of the IRC, was used to recover the costs of the News Program Masters pursuant to which Petitioner deducted all of the costs for each News Program Master in the year of the initial network television broadcast. Like the Soap Program Masters, a portion of the anticipated revenue to be derived from the exploitation of the News Program Masters after the network television broadcast was not included in the income

forecast fraction in the first year because the arrangements that would generate such revenue had generally not been entered into by Petitioner prior to the end of such year.

Applicable law and regulations

Section 1-2.1 of the Business Corporation Franchise Tax Regulations ("Regulations") provides:

> Any term used in this Subchapter shall, unless a different meaning is clearly required, presumably have the same meaning as when used in a comparable context in:
>
> (a) the laws of the United States relating to Federal income taxes and the Federal tax regulations promulgated thereunder....

Section 210.12(a) of the Tax Law provides, in part:

> A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article. The amount of the credit shall be the per cent provided for hereinbelow of the investment credit base. The investment credit base is 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, described in paragraph (b) of this subdivision, less the amount of the nonqualified nonrecourse financing with respect to such property to the extent such financing would be excludible from the credit base pursuant to section 46(c)(8) of the internal revenue code (treating such property as section thirty-eight property irrespective of whether or not it in fact constitutes section thirty-eight property)....

Section 210.12(b)(i) of the Tax Law provides, in part:

> 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 (A) principally used by the taxpayer in the production of goods by manufacturing, processing, assembling....

Subpart 5-2 of the Regulations explains the rules for the ITC provided in section 210.12 of the Tax Law. Section 5-2.4(d) of the Regulations provides that "The term *cost* means the basis of property as defined in section 1012 of the Internal Revenue Code." Section 1012 of the IRC effective at the time section 5-2.4(d) of the Regulations was promulgated in 1976, provided that "The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses)...."

Section 5-2.4(e) of the Regulations provides that "The term *other basis* means the adjusted basis for determining gain or loss used as the basis for depreciation pursuant to section 167(g) of the Internal Revenue Code." Section 167(g) of the IRC effective at the time section 5-2.4(e) of the Regulations was promulgated in 1976, provided that "The basis on which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining the gain on the sale or other disposition of such property."

Section 210.12(g)(1) of the Tax Law contains the recapture provisions with respect to ITC property which is depreciable pursuant to section 167 of the IRC but is not subject to the provisions of section 168 of the IRC and which is disposed of or ceases to be in qualified use prior to the end of its useful life. Such section provides in part "... For purposes of this subparagraph, useful life of property shall be the same as the taxpayer uses for depreciation purposes when computing his federal income tax liability."

Section 5-2.8(d) of the Regulations provides that "Property which ceases to be in qualified use includes: (1) property which qualified and no longer meets the requirements of section 5-2.2 of this Subpart, such as property which no longer has *situs* in New York State or property no longer used in the production of goods...."

Section 179(d)(2) of the IRC defines *purchase* as follows:

> For purposes of paragraph (1), the term "purchase" means any acquisition of property, but only if–
>
> (A) the property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of losses under section 267 or 707(b) ...
>
> (B) the property is not acquired by one component member of a controlled group from another component member of the same controlled group, and
>
> (C) the basis of the property in the hands of the person acquiring it is not determined–
>
> (i) in whole or in part by reference to the adjusted basis of such property in the hands of the person from whom acquired, or
>
> (ii) under section 1014(a) (relating to property acquired from a decedent).

Section 179 of the IRC was added by PL 85-866, effective for taxable years ending after June 30, 1958. Former section 1.179-3(c)(2) of the Treasury Regulations promulgated

thereunder on December 2, 1960, (1960-2 CB 91) provided that "If property is in the process of construction, reconstruction, or erection on December 31, 1957, the term 'purchase' will apply only to that part of the cost of such property which is attributable to such construction, reconstruction, or erection after December 31, 1957...."

Section 38 of the IRC provides for a general business credit. One of the components of the general business credit was the federal regular investment credit computed under section 46 of the IRC before the regular investment credit was repealed by the Tax Reform Act of 1986 (PL 99-514) with respect to property placed in service after December 31, 1985. Section 1.48-1(a) of the Treasury Regulations defines "section 38 property" which is property that qualifies for the general business credit (including the regular investment credit before its repeal) under section 38 of the IRC. Such section 1.48-1(a) of the Treasury Regulations provides that "section 38 property," in part, means "property (1) with respect to which depreciation ... is allowable to the taxpayer, (2) which has an estimated useful life of 3 years or more (determined as of the time such property is placed in service), and (3) which is (i) tangible personal property.... The determination of whether property qualifies as section 38 property in the hands of the taxpayer for purposes of the credit allowed by section 38 must be made with respect to the first taxable year in which such property is placed in service by the taxpayer.... For the meaning of 'estimated useful life', see paragraph (e) of §1.46-3...."

Section 1.46-3(e) of the Treasury Regulations contains the rules for computing the useful life of property for purposes of determining a taxpayer's qualified investment under section 46 of the IRC (which included the regular investment credit before its repeal), and provides, in part:

> (5) *Useful life of property subject to certain methods of depreciation.* If a taxpayer is using a method of depreciation, such as the unit of production or retirement method, which does not measure the useful life of the property in terms of years, he must estimate such useful life in years in order to compute his qualified investment.

Section 1.167(a)-(1)(b) of the Treasury Regulations describes "estimated useful life" in part, as follows:

> For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are ...(2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business.... If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination....

Opinion

The Program Masters would be eligible for the ITC under section 210.12 of the Tax Law only if certain criteria are met. First, a Program Master must be tangible personal property. Next, it must meet the requirements of section 210.12(b) of the Tax Law. Namely, each Program Master must:

- be depreciable pursuant to section 167 of the IRC,
- be acquired by purchase as defined in section 179(d) of the IRC,
- be principally used by Petitioner in the production of goods by manufacturing, processing, assembling, etc.,
- have a situs in New York State, and
- have a useful life of four years or more.

Pursuant to section 1-2.1 of the Article 9-A Regulations, any term used in the Article 9-A Regulations shall presumably have the same meaning as when used in a comparable context in the IRC and the Treasury regulations thereunder.

In many respects, the ITC under section 210.12 of the Tax Law is based on the federal regular investment credit under section 46 of the IRC, and related sections 47 and 48 of the IRC, as such credit was in effect prior to its repeal by the Tax Reform Act of 1986. Therefore, pursuant to section 1-2.1 of the Regulations, where terms are not defined for purposes of determining whether property qualifies for the ITC under section 212.12(b) of the Tax Law, it is appropriate to apply federal regular investment credit precedent for those terms, under sections 46, 47 and 48 of the IRC.

The following is an analysis of each of the eligible requirements under section 210.12 of the Tax Law with respect to the Program Masters.

Tangible Personal Property

In *Walt Disney Productions v United States of America*, 327 F Supp 189 (1971), 71-2 USTC ¶9507, *aff'd* with modifications 480 F2d 66 (1973), cert denied 415US 934 (1974), the U.S. District Court, Central District, California, held that motion picture film negatives were capable of being seen and touched, and the negatives were the plaintiff's stock in trade to its customers. "The motion picture negatives ... are the vehicle for creation of plaintiff's stock in trade–it is *a tool* together with the reproduction processes which allows plaintiff to produce its inventory. Without *this* negative no positive print would be available to plaintiff to carry out its everyday business." (71-2 USTC ¶9507 at p. 87,047.) Such use established the negatives as

"tangible personal property" for purposes of meeting the requirements for being section 38 property (property which qualified for the regular investment credit prior to its repeal) under section 48 of the IRC and section 1.48-1(c) of the Treasury Regulations, as effective for fiscal year ending September 29, 1962. The legislative history of the Revenue Act of 1971 (PL 92-178) expressly approved the decision of the District Court in the *Disney* case. S Rept 92-437 (1971), 1972-1 CB 577-578.

In the *Matter of MCA, Inc*, Dec St Tax Commn, May 3, 1978, TSB-H-78(7)C, film negatives were considered, as a factual matter, to be tangible personal property.

Therefore, following *MCA*, *supra*, and *Disney Productions*, *supra*, a Program Master constitutes tangible personal property for purposes of the ITC under section 210.12 of the Tax Law.

Depreciable Under Section 167 of the IRC

Petitioner states that the Program Masters were depreciated under section 167 of the IRC, using a modified income forecast method for the Soap Program Masters and the income forecast method for the News Program Masters.

In Rev Rul 60-358, 1960-2 CB 68, the Internal Revenue Service determined that the methods of computing depreciation described in section 167(b) were inadequate when applied to television films, resulting in a distortion of income. The Service's view was that such distortion was caused by an uneven flow of income, earned by groups of programs within a series, resulting from contract restrictions, methods of distribution and audience appeal of the programs. The Service stated that "If the film series is a success, additional income will be forthcoming from reruns over a period of years, depending upon its popularity; whereas, unsuccessful film series may produce little or no income after the initial exhibition. Thus the usefulness of such assets in the taxpayer's trade or business is measurable over the income it produces and cannot be adequately measured by the passage of time alone." Therefore, the Service concluded "that the so-called 'income forecast' method is readily adaptable in computing depreciation of the cost of television films without producing any serious distortion of income. This method requires the application of a fraction, the numerator of which is the income from the films for the taxable year, and the denominator of which is the forecasted or estimated total income to be derived from the films during their useful life, including estimated income from foreign exhibition or other exploitation of such films. The term 'income' for purposes of computing this fraction means income from the films less the expense of distributing the films, not including depreciation. This fraction is multiplied by the cost of films which produced income during the taxable year, after appropriate adjustment for estimated salvage value." (Amplified by Rev Rul 64-273, 1964-2 CB 62 to include motion picture films.)

In Rev Proc 71-29, 1971-2 CB 569, the Internal Revenue Service stated that "The forecasting of future income that may be realized from television exhibition of films produced

for theatrical exhibition and domestic syndication of films produced for network television exhibition is generally speculative and unpredictable in view of what have become frequent changes in, and uncertainty of, acceptance of such films for subsequent television exhibition." The Service's view was that films produced for network TV exhibition (such as TV series) are normally, pursuant to contracts with the networks, unavailable for domestic "syndication" (that is, marketing for exhibition by individual stations, including network affiliates) until the network exhibition has ended and that foreign syndication was generally permitted during the period of network exhibition. The Service held that in applying Rev Ruling 60-358, *supra*, and Rev Rul 64-273, *supra*, it would "not require the forecast and estimate of income from domestic syndication of television series or motion picture films produced specifically for television exhibition that are released after December 31, 1970. However, if an arrangement for domestic syndication is entered into prior to the time the cost of the TV series or motion pictures has been depreciated to a reasonable salvage value, the Service will require an estimate of the income from domestic syndication to be made at that time."

Therefore, each Program Master qualifies as being depreciable pursuant to section 167 of the IRC.

Acquired by Purchase

Section 179(d) of the IRC defines the term "purchase" as "any *acquisition* of property ..." (emphasis added), with certain qualifications that are not relevant in this case. Such section does not define *acquisition*. However, Black's Law Dictionary, Fifth Edition, defines *acquisition*, in part, as "The act of becoming the owner of certain property; the act by which one acquires or procures the property in anything." Further, it defines the term *acquire*, in part, as "To gain by any means, usually by one's own exertions; to get as one's own;... The act of getting or obtaining something which may be already in existence, or may be brought into existence through means employed to acquire it.... It does not necessarily mean that title has passed...." (Black's Law Dictionary 23, (5th Edition 1979))

Further, former section 1.179-3(c)(2) of the Treasury Regulations promulgated December 2, 1960, provided that where the taxpayer was in the process of constructing, reconstructing or erecting property on December 31, 1957, the term "purchase" applied to such construction, reconstruction and erection costs but only to such costs attributable to the property after December 31, 1957.

Therefore, each Program Master produced by Petitioner qualifies as being "acquired by purchase" as contemplated under section 179(d)(2) of the IRC.

Principally Used

In the *Matter of Epic Chemicals, Inc.*, Dec St Tax Commn, October 30, 1981, TSB-H-81(59)C, it was held that the printing of personalization upon promotional literature affects such

a change in the literature as to constitute "processing." (See also *Matter of Multimode, Inc.*, Dec St Tax Commn, May 20, 1983, TSB-H-83(23)C.) The conversion of raw film or tape into a form suitable for playback or transmission is in effect a form of imprinting, and the production of duplicate tapes using a master tape constitutes "processing" within the meaning of section 210.12(b) of the Tax Law. (See Technical Services Bureau Memorandum TSB-M-85(11)C, dated June 27, 1985 entitled *Opinion of Counsel, Investment Tax Credit*.)

Therefore, the production of the duplicate copies using a Program Master constitutes "processing" within the meaning of section 210.12 of the Tax Law.

Situs in New York

Petitioner states that the Program Masters were physically located in New York City in Petitioner's tape libraries or other facilities "during the relevant years for which the ITC was claimed."

However, pursuant to section 5-2.8(a) of the Regulations, if property on which ITC has been claimed ceases to be in qualified use prior to the end of its useful life, then the ITC must be recomputed and a portion of the ITC may be recaptured. Under section 5-2.8(d) of the Regulations, property ceases to be in qualified use when it no longer has situs in New York State. Under section 5-2.8(e) of the Regulations, no recapture is required if the cessation occurs after the property was in qualified use for more than 12 consecutive years or after the end of its useful life.

In this case, while it appears that each Program Master was physically located in New York State in the year the ITC was claimed, it is not clear from the facts whether each of the Program Masters was physically located in New York State for its entire useful life or more than 12 consecutive years.

Useful Life of Four Years or More

The term *useful life* is not defined for purposes of section 210.12(b) of the Tax Law. Prior to the Tax Reform Act of 1986, section 48(a)(1) of the IRC provided that the estimated useful life of section 38 property is determined as of the time the property is placed in service. Section 1.48-1(a) of the Treasury Regulations provides that the meaning of *estimated useful life* is found in section 1.46-3(e) of the Treasury Regulations. Under section 1.46-3(e)(5) of the Treasury Regulations, where a taxpayer uses a method of depreciation which does not measure the useful life of the property in terms of years, the taxpayer is required to estimate such useful life in years for investment credit purposes.

For federal income tax purposes prior to 1976, the determination of the useful life of television films was an unresolved issue surrounding the availability of the federal regular investment credit. With the intent to eliminate the uncertainties in the law, including the

determination of useful life, Congress directly addressed the availability of the federal regular investment credit by enacting section 48(k) of the IRC as part of the Tax Reform Act of 1976 (PL 94-455). Section 48(k) of the IRC comprised special rules for the application of the federal regular investment credit to motion picture and television films. Under section 48(k) of the IRC, a qualified film did not include any film or tape "the market for which is primarily topical or is otherwise essentially transitory in nature." Section 1.48-8(a)(3)(iii) of the Treasury Regulations (1979) provided that "A film or tape is topical or essentially transitory in nature if it primarily deals with events and personalities of current interest at the time the film or tape is placed in service."

In *Goodson-Todman Enterprises, Ltd. v Commissioner of Internal Revenue*, 784 F2d 66 (1986), *aff'g* 84 TC 255, the United States Court of Appeals, Second Circuit, analyzed the legislative history of such section 48(k) of the IRC, including the useful life issue. The Court stated that the determination of "useful life" was important before section 48(k) of the IRC was enacted, because no federal regular investment credit was available with respect to property with a useful life of less than three years, one-third credit was available for property of at least three years useful life, the credit increased to two-thirds with a useful life of at least five years, and a full credit was available only for property whose useful life was seven years or more.

In this case, the Program Masters were depreciated using a method that did not measure the useful life of the property in terms of years. Therefore, for ITC purposes under section 210.12 of the Tax Law, the taxpayer is required to estimate such useful life in years as of the time the property is placed in service. Under section 1.167(a)-(1)(b) of the Treasury Regulations, the estimated useful life of an asset is the period over which the asset may reasonably be expected to be useful to the taxpayer in its trade or business or in the production of its income.

The useful life determination must be made for each Program Master as of the time it is placed in service; that is, it must be made with respect to the first taxable year in which the episode is first shown on television. For purposes of section 210.12(b)(i) of the Tax Law, the determination of whether the Program Masters of those episodes placed in service during the taxable years at issue have a useful life of four years or more is made in accordance with section 1.167(a)-1(b) of the Treasury Regulations.

For purposes of section 210.12(b)(i) of the Tax Law, when determining the useful life of a Program Master, Petitioner should take into account its network television broadcast of the episode whereby Petitioner receives advertising receipts, as well as revenue from licensing agreements with respect to the syndication of such episode.

With respect to the taxable years at issue, 1991, 1992, 1993, and 1995 through 1999, a Program Master of an episode will satisfy the useful life requirement of section 210.12(b)(i) of the Tax Law if the Program Master of the episode was placed in service during the taxable year (i.e., the episode of the Soap Program or the News Program was shown by Petitioner on a

network television broadcast during the taxable year), and Petitioner can definitively document that a particular episode has produced or will produce income for Petitioner for four years or more from: (1) using the episode itself, or (2) the syndication of the episode with an unaffiliated entity, or (3) the syndication of the episode with an affiliated entity, if the affiliated entity did in fact show the episode or re-syndicated the episode to an unaffiliated entity, or any combination of (1), (2) or (3). Where Petitioner is relying on a syndication agreement with an affiliated entity, to assist Petitioner and the Department in proving the episode meets the four year useful life requirement, Petitioner and the affiliated entity must waive the secrecy provisions of the Tax Law to the extent necessary.

If Petitioner cannot document that a Program Master has a useful life of four years or more at the time it is placed in service, it may not claim an ITC when its return for that taxable year is initially filed. However, if Petitioner can subsequently document that the episode has produced or will produce income for Petitioner for four years or more, as described above, Petitioner may for taxable years open under the statutory period provided for in section 1087 of the Tax Law, claim the investment tax credit by filing either an amended return or Form CT-8, *Claim for Credit or Refund of Corporation Tax Paid.*

However, the actual determination of the useful life of a Program Master is a factual matter not susceptible of determination within the context of 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).

Conclusion

For purposes of section 210.12 of the Tax Law, Petitioner's Program Masters are tangible personal property, are depreciable pursuant to section 167 of the IRC, are acquired by purchase as defined in section 179(d) of the IRC, have a situs in New York State when placed in service and are principally used by Petitioner in the production of goods by manufacturing, processing, assembling, etc. Where it is determined that a News Program Master or Soap Program Master had a useful life of four years or more at the time it was placed in service, it appears that the News Program Master or Soap Program Master meets the requirements of section 210.12 of the Tax Law to be eligible for the ITC. Further, if it is determined that a Program Master qualified for the ITC, but it ceased to be in qualified use prior to the end of its useful life, or was not physically located in New York State for its entire useful life or for more than 12 consecutive years, a portion of such allowable ITC must be recaptured pursuant to section 210.12(g) of the Tax Law.

Where the Program Masters meet all of the conditions to qualify for the ITC under section 210.12 of the Tax Law, the credit is computed on the investment credit base which, pursuant to section 5-2.4 of the Regulations, is either (i) the "cost" for federal income tax purposes, which is the basis of the property under section 1012 of the IRC, or (ii) "other basis" for federal income tax purposes, which is the adjusted basis under section 1011 of the IRC for determining

gain on the sale or other disposition of such property. It appears that the cost or other basis of the Program Masters for federal income tax purposes would be determined using the uniform capitalization rules of section 263A of the IRC, pursuant to section 263A(b)(1) of the IRC. Such section provides that section 263A applies to "real or tangible personal property produced by the taxpayer" except as otherwise provided. The exceptions do not appear to apply to property such as the Program Masters.

DATED: July 26, 2006

/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.