

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C821207A

On December 7, 1982 a Petition for Advisory Opinion was received from Flexovit USA, Inc., 1305 Eden-Evans Center Road, Angola, New York 14006.

Petitioner inquires as to the availability of the eligible business facility credit under the circumstances described herein.

Petitioner received certificates of eligibility from the New York State Job Incentive Board with respect to an eligible business facility for the years 1978 through 1981. Petitioner, with respect to each of those years, claimed an investment tax credit, pursuant to Section 210.12 of the Tax Law, based on property includible as eligible property for purposes of the eligible business facility credit provided for under Section 210.11 of the Tax Law. Petitioner did not claim the eligible business facility credit with respect to any of the four years in question.

Petitioner inquires as to whether it may retroactively claim the eligible business facility credit in place of the investment tax credit. Petitioner may file an amended return, if done in a timely manner, deleting its claim for the investment tax credit and asserting a claim for the eligible business facilities credit. Thus, Section 5-1.4 of the Franchise Tax Regulations provides, in relevant part, as follows:

. . . if the property for which an investment tax credit has been claimed becomes eligible for the eligible business facility credit, the report on which the investment tax credit was claimed may be amended so as to eliminate the investment tax credit for the eligible property, if the amendment is made within the statute of limitations.

Where the amendment to the original return results in an overpayment of tax, such amendment will be deemed a claim for refund. Such refund will be allowable only if the amended return is filed within the time allowed under section 1087 of the Tax Law, generally within three years from the filing of the original return or within two years from the payment of tax, whichever of such periods expires the later. No such time limitation is applicable to an amended return which results in a deficiency or underpayment of tax or in no change. While such procedures are not explicitly mandated by the Franchise Tax Regulations, they are consistent with 20 NYCRR 154.4(c), which deals with changes of election under Personal Income Tax provisions essentially similar to those operable with regard to Article 9-A. If Petitioner's eligible business facilities credit is utilized for any of the tax years 1979, 1980 or 1981, but not for 1978, such credit will be applicable only to property which was not the subject of the 1978 (or any subsequent) investment tax credit.

Finally, Petitioner states that it was advised by the Job Incentive Board in 1979 that it had a "three year period in which to select the beginning of the use of the JIB program credits. However, now we are advised that the JIB credits should have been used beginning in 1978." Petitioner requests a clarification on this point. Petitioner is advised that there is no requirement applicable to its situation which would mandate the commencement of use of the eligible business facility credit in 1978. Petitioner may commence its use of the credit in the earliest year permissible under the statute of limitations referred to in the preceding paragraph.

DATED: October 3, 1984

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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