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

TSB-A-85 (6) C
Corporation Tax
May 1, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. C840920A

On September 20, 1984 a Petition for Advisory Opinion was received from Alcan Aluminum Corporation, P.O. Box 511, Warren, Ohio 44482.

At issue is whether, under Article 9-A of the Tax Law, the unused New York State investment tax credit (section 210.12) and employment incentive tax credit (section 210.12-A) of a merged corporation may be used as a carry forward by the surviving corporation after a statutory merger.

Petitioner presents the following statement of facts. A corporation organized under the laws of the State of New York currently taxable under Article 9-A of the Tax Law has unused investment tax credit and unused employment incentive tax credit. The New York corporation proposes to acquire 100 percent of all the shares of stock of a corporation organized under the laws of the State of Ohio. The Ohio corporation is not doing business in New York State. Subsequent to the acquisition of the Ohio corporation, the New York corporation proposes to be statutorily merged into the Ohio corporation and thereafter the surviving corporation's name will be changed to that of the former New York corporation. After the merger, all the operations, including the New York operations, will continue as they were prior to the merger.

Sections 210.12(e) and 210.12-A(c) of the Tax Law states, in part:

> ". . .any amount of credit not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years."

Section 208.2 of the Tax Law defines the term "taxpayer" as any corporation subject to tax under Article 9-A.

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

> "A credit shall be allowed under this section with respect to tangible personal property and other tangible property, . . . which . . . are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, . . ."

Section 210.12(g) of the Tax Law provides for the recapture of investment tax credit when property on which investment tax credit was claimed is disposed of or ceases to be in qualified use prior to the end of its useful life. The recapture of such investment tax credit is further explained by Business Corporation Franchise Tax regulation section 5-2.8. Such regulation section 5-2.8(e) states,

> "For purposes of this section, a disposition does not occur where property is transferred from a corporation as part of a transaction to which section 381(a) of the Internal Revenue Code applies; e.g., a complete liquidation of a subsidiary under section 332 of the Internal Revenue Code, or a reorganization under section 361 and section 368(a)(1)(A) (statutory merger or consolidation), section 368(a)(1)(C) (certain acquisitions of property from one corporation by another), section 368(a)(1)(D) (certain transfers of assets), or section 368(a)(1)(F) (mere change in identity, form or place of organization, however effected). As there is no disposition in these cases, an add back is not required provided that the property continues in qualified use and is acquired by a corporation subject to tax under article 9-A. Generally, in these cases, the acquiring or surviving corporation cannot claim an investment tax credit because it takes over such property at the adjusted basis of the transferor and the transfer does not qualify as a purchase pursuant to Internal Revenue Code section 179(d)(2). If the property in the hands of the acquiring corporation is not in qualified use for its entire life or for more than 12 consecutive years, a recovery from the acquiring corporation is required. In measuring the period of qualified use, the period during which the property was held by the transferor corporation and the acquiring corporation are to be taken into account."

Section 5-3.4 of the Business Corporation Franchise Tax regulations provides for the recapture of the employment incentive tax credit when property on which the investment tax credit was claimed is disposed of or ceases to be in qualified use prior to the end of its useful life.

Assuming that the merger of the New York Corporation is a statutory merger under section 368(a)(1)(A) of the Internal Revenue Code and the property continues in qualified use in New York State and is acquired by a corporation subject to tax under Article 9-A of the Tax Law, there would be no diposition of property and the merged corporation when filing its final New York State Corporation Franchise Tax Report would not be required to recapture the investment tax credit or the employment incentive tax credit. The surviving corporation would be allowed to use the unused investment tax credit and employment incentive tax credit acquired from the merged corporation. However, the surviving corporation would not be allowed to compute any additional investment tax credit or employment incentive tax credit on property acquired from the merged corporation, since such property would not qualify as a purchase as defined in section 179(d) of the Internal Revenue

Code. Furthermore, the surviving corporation would be required to recapture the investment tax credit and the employment incentive tax credit if the property it acquired from the merged corporation ceases to be in qualified use before the end of its useful life or before it has been in qualified use for more than 12 consecutive years.

DATED: April 30, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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