

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

TSB-A-87 (16) C
Corporation Tax
June 15, 1987

STATE OF NEW YORK

STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C870226A

On February 26, 1987, a Petition for Advisory Opinion was received from Cibro Petroleum Products, Inc. 1066 Zerega Avenue, Bronx, New York 10462.

The issue raised is whether Petitioner's failure to contest a notice of deficiency related to an erroneous disallowance of an investment tax credit deprives Petitioner of the right to claim an investment tax credit carry forward of the unused portion of such credit that is applicable to the same assets.

Petitioner states that for taxable year ended September 30, 1978 it properly claimed an investment tax credit of \$476,764 for the addition of a topping plant that processes crude oil into various grades of heating oil, kerosene and naphtha. Petitioner applied \$4,752 of the credit to its tax liability for taxable year ended September 30, 1978 and carried forward the balance of \$472,012 to be applied against future tax liabilities.

For taxable years ended November 30, 1979 and November 30, 1980, Petitioner qualified for and claimed the additional investment tax credit of \$238,382 (50% of 476,764) in each year. Accordingly, the total of the carry forward at issue is \$948,776 comprised as follows:

From taxable year ended September 30, 1978	\$472,012
From taxable year ended November 30, 1979	238,382
From taxable year ended November 30, 1980	<u>238,382</u>
Total	\$948,776

On March 14, 1980, a Notice of Deficiency was issued disallowing the investment tax credit of \$4,752. The amount of the deficiency was applied to reduce a refund due Petitioner for taxable year ended September 30, 1975. Petitioner did not contest the deficiency.

Upon audit of Petitioner's tax return for taxable year ended November 30, 1981, it was determined by the auditor that for taxable year ended September 30, 1978 the disallowance of the investment tax credit of \$4,752 was incorrect. However, for taxable year ended November 30, 1981 the Audit Division reduced the amount of the investment tax credit carry forward claimed by Petitioner by \$948,776 (the carry forward applicable to the topping plant) because Petitioner had failed to contest the deficiency paid for taxable year September 30, 1978 that disallowed a portion of the investment tax credit claimed for the topping plant.

Section 1089(b) of the Tax Law provides that within ninety days after the mailing of the notice of deficiency, the taxpayer may file a petition with the Tax Commission for a redetermination of the deficiency.

RODERICK G. W. CHU, COMMISSIONER

GABRIEL B. DICERBO, DEPUTY COMMISSIONER

FRANK J. PUCCIA, DIRECTOR

Section 1089(g) of the Tax Law provides that "[t]he tax commission shall consider such facts with relation to the taxes for other years as may be necessary correctly to determine the tax for the taxable year, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year has been overpaid or underpaid."

Petitioner is now barred, by the statute of limitations, from filing a timely petition for a redetermination of the deficiency issued for taxable year ended September 30, 1978, which incorrectly disallowed the investment tax credit of \$4,752.

However, when determining the proper tax liability for taxable year ended November 30, 1981, the Tax Commission, pursuant to section 1089(g) of the Tax Law, can redetermine the amount of an investment tax credit carry forward from a closed period to an open period. Matter of Twin Lake Chemical, Inc., State Tax Commission, January 17, 1986, TSB-H-86(4)C; Matter of Master Eagle Photo Engraving Corp., State Tax Commission, February 4, 1983, TSB-H-83(6)C.

In the instant case, it is determined that the proper amount of investment tax credit carry forward from taxable year ended September 30, 1978 is \$472,012 as claimed by Petitioner. In addition, pursuant to section 210.12-A of the Tax Law, Petitioner is allowed the additional investment tax credit carry forward from taxable years ended November 30, 1979 and November 30, 1980 of \$238,382 that was claimed for each year.

Accordingly, pursuant to section 1089(g) of the Tax Law, Petitioner may carry forward to taxable year ended November 30, 1981, the unused investment tax credit and additional investment tax credit of \$948,776 that is attributable to the topping plant, even though Petitioner did not contest the deficiency paid for taxable year September 30, 1978.

DATED: June 15, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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