

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

TSB-A-87 (19) C
Corporation Tax
July 20, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C870326A

On March 26, 1987, a Petition for Advisory Opinion was received from Edward Weck & Company, Inc., c/o Squibb Corporation, P.O. Box 4000, J306, Princeton, New Jersey 08543-4000.

At issue is the proper meaning of "real property and related equipment" as used in Technical Services Bureau Memorandum TSB-M-82(3)C, with regard to the exclusion of construction in progress from the property factor when computing the business allocation percentage for purposes of Article 9-A of the Tax Law.

As a result of an audit of Petitioner's franchise tax returns for taxable years 1982, 1983 and 1984, the Tax Department auditor excluded from Petitioner's property factor, all construction in progress, both real and personal property. This exclusion is based on the auditor's interpretation of Technical Services Bureau Memorandum TSB-M-82(3)C, Business Allocation Percentage - Construction in Progress, which states Tax Department policy on this issue.

Petitioner contends that "real property and related equipment" means real property such as buildings and the equipment related to it, such as air conditioners, elevators, escalators and improvements, but that machinery and equipment are personal property that are not related equipment.

Petitioner's building is leased and Petitioner believes that the leasehold improvements included in construction in progress should be classified as real property excluded from the property factor and that personal property, such as machinery and equipment, included in construction in progress should not be excluded from the property factor.

Section 210.3(a)(1) of the Tax Law provides that the property factor of the business allocation percentage is determined by ascertaining the percentage which the average value of the taxpayer's real and tangible personal property within New York State during the period covered by its report bears to the average value of all the taxpayer's real and tangible personal property wherever situated during such period.

Technical Services Bureau Memorandum TSB-M-82(3)C, states, in pertinent part:

Effective for taxable years beginning on or after January 1, 1982, real property and related equipment, except inventoriable goods, which is under construction and is not occupied and used during such construction, shall be excluded from the numerator and denominator of the property factor when computing the business allocation percentage. Property or equipment which is partially used by the taxpayer in the regular course of his trade or business while under construction should be included in the property factor to the extent used by the taxpayer....

The phrase "real property and related equipment" was intended to include real property under construction and personal property under construction that is related to the real property. For instance, such personal property includes an assembly line that must be constructed or assembled in conjunction with the construction of the building which houses the assembly line. The phrase also includes personal property that cannot be functional until the real property under construction is completed, such as a large turbine that must be installed at a site before the building is constructed around it. Accordingly, it is concluded that the phrase "real property and related equipment" was intended to be more inclusive than suggested by Petitioner.

Furthermore, the authority for the establishment of the policy contained in Technical Services Bureau Memorandum TSB-M-82(3)C is provided in section 210.8 of the Tax Law which states that:

If it shall appear to the tax commission that any business... allocation percentage determined as herein above provided does not properly reflect the activity, business, income or capital of a taxpayer within the state, the tax commission shall be authorized in its discretion, in the case of a business allocation percentage, to adjust it by...(c) excluding one or more assets....

Therefore, it is always within the discretion of the Tax Commission to exclude assets from the property factor when justified by the circumstances of the particular case. However, an Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts." Tax Law, section 171, subd. twenty-fourth; 20 NYCRR 901.1(a). It is not within the scope of an Advisory Opinion to determine questions of fact such as whether a discretionary adjustment under section 210.8 of Article 9-A of the Tax Law should be granted.

Inasmuch as the question presented here arises within the context of an audit, the necessary factual determination will be made within such context.

DATED: July 20, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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