

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

TSB-A-87 (28) C  
Corporation Tax  
October 27, 1987

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C851126A

On November 26, 1985, a Petition for Advisory Opinion was received from The Carborundum Company, 20600 Chagrin Blvd., Cleveland, Ohio 44122.

The issue raised is whether, for taxable years 1979 and 1980, Petitioner is entitled to the employment incentive tax credit provided for in section 210.12-A of Article 9-A of the Tax Law with respect to the assets acquired by merger of its subsidiary, The Carborundum Company (hereinafter "Old Carborundum").

Petitioner, incorporated as Kennecott Industries, Inc., a wholly-owned subsidiary of Kennecott Copper Corporation, was incorporated under the laws of Delaware in 1977 for the purpose of making a tender offer for the shares of Old Carborundum, a Delaware corporation. The public tender offer commenced on November 29, 1977, and before it expired on January 4, 1978, Petitioner had acquired over 90% of the outstanding shares of the+ common stock of Old Carborundum. Petitioner thereupon acquired the assets of Old Carborundum by a merger of Old Carborundum into Petitioner effective January 12, 1978. Immediately after the merger, Petitioner changed its name to The Carborundum Company.

During 1977, Petitioner had no employees of its own. The four persons who served as directors and executive officers of Petitioner were officers of Kennecott Copper Corporation. Petitioner's offices were at 161 East 42nd Street, New York City, the principal executive office of Kennecott Copper Corporation. Such office was listed in the Offer to Purchase circular dated November 29, 1977 as the principal executive office of Petitioner. During 1977, Petitioner's books and records were kept and accounting was performed at this location. Petitioner has filed a New York State franchise tax return for 1977 reporting capital allocable to New York State and tax payable thereon.

Upon the upstream merger (Internal Revenue Code 334(b)(2) liquidation) of Old Carborundum in 1978, Petitioner acquired assets with respect to which an investment tax credit is allowable pursuant to section 210.12 of the Tax Law. By this transaction, Petitioner became the employer of a substantial number of employees within New York State.

Based upon its interpretation of the law, Petitioner believes that it is eligible for the employment incentive tax credit for taxable years 1979 and 1980 based on the investment tax credit claimed in 1978. This position is based on the fact that the employment level of Petitioner for taxable years 1979 and 1980 exceeded 101% of the employment level of Petitioner in 1977 when Petitioner had no employees. However, it should be noted that the employment level of Petitioner for taxable years 1979 and 1980 was less than 101% of the employment level of Old Carborundum in 1977.

Section 210.12-A of the Tax Law provides for an employment incentive tax credit of 50% of the amount of investment tax credit allowed under section 210.12 of the Tax Law for each of the three years next succeeding the taxable year for which the investment tax credit is allowed with respect to property, the acquisition, construction, reconstruction or erection of which commenced on or after January 1, 1976 and prior to January 1, 1987. Provided, that the employment incentive tax credit for any taxable year shall only be allowed if the average number of employees during such taxable year is at least 101% of the average number of employees during the taxable year immediately preceding the taxable year for which the investment tax credit is allowed.

Section 5-3.5 of the Business Corporation Franchise Tax Regulations as amended on September 29, 1987 provides, in part, the following example:

Example 1: A calendar year taxpayer acquired property which qualified for the investment tax credit on June 2, 1981 for \$100,000.00 with a useful life of 10 years. The taxpayer's average number of employees within New York State are as follows:

<u>1980</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>
200	205	201	202

The taxpayer would be allowed credits against the tax due based on such property as follows:

1981 - Investment tax credit (5% x \$100,000)	\$5,000.
1982 - Employment incentive tax credit (50% x \$2,000)	2,500.
1983 - No credit	-0-
1984 - Employment incentive tax credit (50% x \$5,000)	2,500.

It is noted that Example 4 of section 5-3.5 was repealed by the September 29, 1987 amendment to the Business Corporation Franchise Tax Regulations.

Based upon the provisions of section 210.12-A of the Tax Law and the regulations promulgated thereunder, Petitioner qualifies for the employment incentive tax credit with respect to the assets acquired by merger of its subsidiary, Old Carborundum, for taxable years 1979 and 1980 inasmuch as it qualified for the investment tax credit pursuant to section 210.12 of the Tax Law for taxable year 1978 and inasmuch as its average number of employees during taxable years 1979 and 1980 was at least 101% of its average number of employees during 1977.

DATED: October 27, 1987

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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