STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C881103B

On November 3, 1988, a Petition for Advisory Opinion was received from Algorex Corporation, 70 Corporate Drive, Hauppauge, New York 11788.

The issue raised, is whether, for purposes of qualifying for the investment tax credit, "usable business floor space", as defined in Business Corporation Franchise Tax Regulation section 5-2.4(c), includes space that is neither finished nor used. Usable business floor space is the basis for determining the denominator and numerator of the fraction used in computing the percentage of "principal use" of a building.

Petitioner moved its operations into a new building during the fiscal year ended June 30, 1985. Petitioner acquired a larger space than was necessary at the time. This excess capacity space has not been finished. There are no heating, ventilating, air conditioning, plumbing or electric systems to support anything other than storage function.

For taxable years beginning prior to January 1, 1987, section 210.12 of the Tax Law allows an investment tax credit against the tax imposed under Article 9-A of the Tax Law equal to six percent of the cost or other basis for federal income tax purposes of qualified tangible personal property and other tangible property, including buildings and structural components of buildings.

Section 5-2.1 of the Business Corporation Franchise Tax Regulations (hereinafter "Regulations") provides that the taxpayer must claim the investment tax credit for the first taxable year in which the property becomes qualified property.

Section 5-2.2 of the Regulations provides that the term "qualified property" means tangible personal property and other tangible property, including buildings and structural components of building, which:

(1) are acquired, constructed, reconstructed or erected after June 30, 1982;

(2) are depreciable pursuant to section 167 of the Internal Revenue Code or recovery property with respect to which a deduction is allowable under section 168 of the Internal Revenue Code;

(3) have a useful life of four years or more;

(4) are acquired by purchase as defined in section 179(d) of the Internal Revenue Code;

(5) have a situs in New York State; and

(6) are principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing.

Section 5-2.4 of the Regulations provides that property used in the production of goods includes all facilities used in the production operation, including the storage of material to be used in production and the products that are produced.

Section 5-2.4 of the Regulations also provides that property is "principally used" in an activity if more than 50% of its use is in such activity. A building or addition to a building is principally used in production where more than 50 percent of its usable business floor space is used in storage and production. Floor space used for bathrooms, cafeterias and lounges is not usable business floor space. Space used for offices, accounting, sales and distribution is not used in production.

When determining whether a building is principally used more than 50 percent for storage and production, the percentage of usable business floor space used in storage and production is computed. The percentage is computed by a fraction the numerator of which is usable business floor space used in production and in the storage of materials to be used in production and the products that are produced. The denominator of the fraction is total usable business floor space. When computing usable business floor space, the entire building must be considered. However, an exclusion, from both the numerator and denominator of the fraction, is allowed for floor space used for bathrooms, cafeterias and lounges. The floor space that is used for offices, accounting, sales and distribution is usable business floor space that must be included in the denominator of the fraction but is excluded from the numerator because such floor space is not used in production.

Herein, when computing the percentage of usable business floor space used in storage and production, Petitioner must include in the denominator the floor space Petitioner defines as "excess capacity space" that has not been finished and which can only support a storage function. Such space may be included in the numerator, if it is used for the storage of material to be used in production or the storage of the products that are produced. The floor space that is used for bathrooms, cafeterias and lounges should be excluded from both the numerator and denominator.

If the resulting percentage, computed for fiscal year ended June 30, 1985 is more than 50 percent, the building is principally used in the production of goods and if all the other criteria for qualifying property are also met, Petitioner may claim the investment tax credit for the building for fiscal year ended June 30, 1985.

If the resulting percentage is 50 percent or less, the building is not principally used in the production of goods and is not qualified property for purposes of computing the investment tax credit. However, if in the future the excess capacity space or other portion of the building is converted into production or qualifying storage space and a recomputation of the percentage of usable business floor space used for production and storage results in a percentage over 50 percent, the "principally used" test will be met.

If the "principally used" test is met in a taxable year after fiscal year ended June 30, 1985, and all the other criteria for qualifying property are also met, Petitioner will have placed the building in qualified use and may claim the investment tax credit on the depreciated value of the building for the taxable year in which the property became qualified. The credit would be computed at the six percent rate that was in effect for fiscal year ended June 30, 1985, the year the building was acquired, constructed, reconstructed or erected.

DATED: May 17, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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