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

TSB-A-95 (17) C
Corporation Tax
September 26, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C950329A

On March 29, 1995, a Petition for Advisory Opinion was received from K. Van Bourgondien & Sons, Inc., Farmingdale Road, Babylon, New York 11702.

The issue raised by Petitioner, K. Van Bourgondien & Sons, Inc., is whether Petitioner's new building qualifies for the investment tax credit contained in section 210.12 of the Tax Law.

In 1994, Petitioner constructed a new 37,000 square foot building that is used for horticultural activities.

Petitioner imports live flower bulbs in bare root condition, in bulk, in large commercial containers. Petitioner sorts the bulbs to discard non-live bulbs and repacks the vast majority of the bulbs in point of sale display packages, and, in some instances, in flower pots. The repacked bulbs are for the most part sold to major national resellers who require this method of packaging. Furthermore, the package is typically placed in a special horticulture medium, such as peat moss or wood shavings to accomplish various goals to ensure retail shelf life dependent upon the specific bulb. Some bulbs require controlled ventilation and some moisture retention. The bulbs are stored in large cold storage units within the building where a temperature of approximately 35 degrees Fahrenheit is constantly maintained, until shipped to customers.

Section 210.12 of the Tax Law allows an investment tax credit against the tax imposed under Article g-A of the Tax Law. For taxable years beginning after 1990, section 210.12 allows an investment tax credit equal to five percent with respect to the first $350 million of the investment credit base and four percent with respect to the investment credit base in excess of $350 million. The investment credit base is 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 5-2.2(a) of the Business Corporation Franchise Tax Regulations provides that:

> the term "qualified property" means tangible personal property and other tangible property, including buildings and structural components of buildings, which:
>
> (1) is acquired, constructed, reconstructed or erected by the taxpayer after December 31, 1968;
>
> (2) is depreciable pursuant to section 167 of the Internal Revenue Code;

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

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

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

(6) is 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(c) of the Business Corporation Franchise Tax Regulations provides that:

> [t]he term "principally used" means more than 50 percent. 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 ....

In the Matter of J. H. Wattles, Inc., Dec St Tax Comm, October 30, 1981, TSB-H-81(58)C, the petitioner was engaged in the wholesale egg business. It purchased eggs directly from producer farms in farm-run condition and prepared them for distribution to supermarkets in accordance with applicable state and Federal statutes. The eggs were received in a refrigerated condition and the petitioner held the eggs in coolers. The petitioner transported the eggs by conveyor through a mechanized washing system, and then to a candling station where employees selected out any undesirable eggs. Next, the quality eggs were weighed and transported, by weight, to the packing station and mechanically dropped into dozen cartons. The cartons were then packed into cases and taken by pallet to coolers to await distribution. The petitioner was denied investment tax credit on its equipment because the operations the petitioner performed on the farm-run eggs did not constitute manufacturing or processing within the meaning of section 210.12(b) of the Tax Law, since the end result was not so significantly different from the raw material. In its conclusions, the Tax Commission cited Gressel Produce Co. v Kosydar, 297 NE2d 532 (Ohio, 1973) wherein the court examined an operation like J.H. Wattles and the court stated:

> The operation described herein evidences no change in the state or form of the eggs regardless of the fact that they may have been enhanced in value. Those eggs which were unfit for consumption when received from the producer remained unfit for consumption; and those eggs which were fit for consumption when delivered to the retailer were fit for consumption at the time they were received. Id. at 536.

In the Matter of Dobbins & RamaKe, Inc., Dec St Tax Comm, July 20, 1987, TSB-H-87(21)C, the petitioner engaged in the production of apple juice and the packaging and marketing of whole apples. The petitioner purchased apples or received them on consignment from growers in tree-run condition. The petitioner assembled and graded the apples according to size and quality,

disposing of poor quality apples. The apples were then placed in atmosphere-controlled, sealed storage rooms which served to retard their spoilage, thereby lengthening the life of the apples. When needed, the petitioner removed the apples from the storage rooms and cleaned them. The higher graded apples were then bagged for sale. The remaining apples were sent, after cleaning, to be processed into apple juice. The petitioner was denied investment tax credit on its grading and assembling equipment and the equipment used to operate the atmosphere controlled storage rooms because such equipment was principally used in the marketing and sale of fresh apples. The petitioner's activities in grading, assembling, storing and cleaning apples to be sold as fresh did not constitute the production of goods by processing within the meaning of section 210.12(b) of the Tax Law. The apples sold were not significantly different than the tree-run apples received by the petitioner.

Herein, Petitioner imports live flower bulbs in bare root condition. Petitioner sorts the bulbs to discard non-live bulbs and repacks the rest in point of sale display packages or flower pots to be sold to wholesalers. The package is placed in a special horticulture medium to ensure retail shelf life of the bulbs and are stored in cold storage units until shipped. Petitioner's activities are similar to the activities described in the Matter of J. H. Wattles, Inc., supra and Matter of Dobbins & Ramage, Inc., supra, and Petitioner's packaging and storage activities do not constitute the production of goods by processing or assembling within the meaning of section 210.12(b) of the Tax Law. The bulbs sold are not significantly different than the imported bulbs.

Accordingly, since Petitioner's building is not principally used in the production of goods within the meaning of section 210.12(b) of the Tax Law and section 5-2.2 of the Business Corporation Franchise Tax Regulations, such building is not "qualified property" within the meaning of such sections. Therefore, Petitioner is not allowed an investment tax credit under section 210.12 of the Tax Law for its new building used as described herein.

DATED: September 26, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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