STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C980130A

On January 30, 1998, a Petition for Advisory Opinion was received from Bayer Corporation, 1884 Miles Avenue, P.O. Box 400, Elkhart, Indiana 46515.

The issue raised by Petitioner, Bayer Corporation, is whether, for purposes of Article 9-A of the Tax Law, a first tier subsidiary's investment tax credit may be carried over after its parent is acquired by an unrelated corporation and the subsidiary is later, and separately, merged into the acquirer after having been part of the acquirer's affiliated group.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Technicon Instruments Inc ("Instruments") was owned 100 percent by Cooper Technicon Inc (which later changed its name to Technicon Diagnostics Inc ("Diagnostics") and they filed on a combined basis. On June 29, 1989, all of the stock of Diagnostics was sold by Diagnostics' parent corporation to Miles Inc ("Miles"), an unrelated corporation. Miles purchased the stock of Diagnostics for cash. Following this acquisition, Miles, Diagnostics, and Instruments were all part of the same affiliated group for federal income tax purposes. At the time of the acquisition of Diagnostics by Miles, Instruments had unused New York State investment tax credits that had been carried over from earlier years pursuant to section 210.12 of the Tax Law.

Petitioner, Miles parent corporation, states that subsequent and independent of Miles' acquisition of Diagnostics, Diagnostics merged into Miles and shortly thereafter Instruments, at that time a wholly owned subsidiary of Miles, merged into Miles.

Petitioner states that the mergers were separate, apart and distinct from the initial acquisition of Diagnostics by Miles. At the time of this acquisition, there was no plan, written or otherwise, to execute the mergers. The acquisition was at all times independent of the subsequent mergers. It was only after Miles acquired Diagnostics that it was able to recognize the operational inefficiencies that could be remedied by merging the companies into one entity.

Section 210.12 of the Tax Law allows an investment tax credit against the tax imposed under Article 9-A of the Tax Law. For taxable years beginning after 1990, section 210.12(a) 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 210.12(e)(1) of the Tax Law provides that the investment tax credit allowed under section 210.12 for any taxable year shall not reduce the tax due for such year to less than the higher of the amounts prescribed under the minimum taxable income base and the fixed dollar minimum. However, if the amount of credit allowable for a taxable year commencing prior to January 1, 1987 and not deductible in such year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years but in no event shall such credit be carried over to taxable years beginning on or after January 1, 2002, and any amount of credit allowed for a taxable year beginning on or after January 1, 1987 and not deductible in such year may be carried over to the 15 taxable years next following such taxable year and may be deducted from the taxpayer's tax for such year or years.

Section 210.12(e)(2) of the Tax Law provides that a taxpayer may not carry over any amount of credit or credits allowed under section 210.12 to a taxable year during which a corporate acquisition with respect to which it was a target corporation occurred ("acquisition year"), or to any subsequent taxable year, where such credit was allowed for a taxable year prior to the acquisition year.

Section 210.12(e)(3) of the Tax Law provides that in the case of a corporate merger or corporate consolidation, the surviving or consolidated corporation, as the case may be, may not carry over any amount of credit or credits allowed under section 210.12 which is attributable to any constituent corporation to the taxable year during which such corporate merger or corporate consolidation occurred ("merger or consolidation year"), or to any subsequent taxable year, where such credit was allowed for a taxable year prior to the merger or consolidation year.

Section 208.13 of the Tax Law defines a "corporate merger" as a procedure comprised of the merging of, two or more constituent corporations into a single corporation which is one of the constituent corporations, under Article 9 of the Business Corporation Law, the corresponding statutes of other states and/or the corresponding statutes of foreign nations. In the case of a corporate merger, "acquiring person" means the constituent corporation the stockholders of which, after the merger, own the largest proportion of the total voting power in the surviving corporation, and "target corporation" means all other constituent corporations. A corporate merger does not include an excluded transaction as defined in section 208.16 of the Tax Law or a procedure described hereinabove which was completed prior to the effective date of section 208.13.

Section 208.15 of the Tax Law defines a "corporate acquisition" as the acquisition on an "acquisition date" by purchase and/or otherwise (including redemption), by a person (the "acquiring person"), as the term person is defined in section 7701(a)(1) of the Internal Revenue Code ("IRC"), of stock of a corporation (the "target corporation"), such that immediately prior to such acquisition such person owned 50 percent or less, and immediately thereafter owned more than 50 percent of the total voting power in the target corporation. A corporate acquisition does not include an excluded transaction as defined in section 208.16 of the Tax Law or an acquisition described hereinabove which occurred prior to the effective date of section 208.15.

Section 208.16 of the Tax Law provides that an "excluded transaction" means, in part, "a merger or consolidation where all the constituent corporations are members of an affiliated group as defined in section 1504 of the IRC, except that the term "common parent corporation" shall be deemed to mean any person, as defined in section 7701(a)(1) of the IRC, and except that references to 'at least eighty percent' in such section 1504 shall be read as 'more than fifty percent'".

In this case, prior to June 29, 1989, Diagnostics wholly owned Instruments. Miles, an unrelated corporation, acquired all of the stock of Diagnostics on June 29, 1989 for cash. Pursuant to section 208.15 of the Tax Law, a "corporate acquisition" is the acquisition by purchase "of the stock of a corporation ("the target corporation"), such that immediately prior to such acquisition such person owned 50 percent or less, and immediately thereafter owned more than 50 percent of the total voting power in the target corporation" ("emphasis added). Therefore, the target corporation in this corporate acquisition by Miles, was Diagnostics. After the acquisition, Diagnostics still held all of the stock of Instruments. Therefore, Instruments was not the target corporation pursuant to section 208.15, even though Diagnostics and Instruments filed on a combined basis prior to the acquisition. Accordingly, Instruments' investment tax credit carryover was not limited by section 210.12(e)(2) of the Tax Law. Instruments was still allowed to carry over its unused investment tax credit to future taxable years.

After Miles acquired Diagnostics, Miles, Diagnostics and Instruments were all part of the same affiliated group for federal income tax purposes. Subsequently, Diagnostics was merged into Miles and shortly thereafter, Instruments, as a subsidiary of Miles, was merged into Miles. Pursuant to section 208.16 of the Tax Law, the merger of Instruments into Miles was an excluded transaction for purposes of determining what constitutes a corporate merger under section 208.13 of the Tax Law, because it was the merger of affiliated corporations. Therefore, Instruments' investment tax credit carryover was not limited by section 210.12(e)(3) of the Tax Law. Accordingly, Miles, the surviving corporation, may carry over the investment tax credit that was attributable to Instruments and allowed for a taxable year prior to the merger into Miles.

/s/

DATED: July 1, 1998

John W. Bartlett
Deputy Director
Technical Services Bureau

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