

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-06(7)I  
Income Tax  
August 28, 2006

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I060522A

On May 22, 2006, a Petition for Advisory Opinion was received from George Fox, 7 White Deer Ct., Huntington, New York 11743. Petitioner, George Fox, provided additional information with respect to the Petition on July 11, 2006.

The issue raised by Petitioner is whether Petitioner is entitled to a refund of the investment tax credit.

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

On June 1, 2006, Petitioner completed the construction of a natural gas fueling station for fueling motor vehicles. The station will take uncompressed natural gas from the main in the street and compress it into onboard tanks in registered motor vehicles for use on the roads of New York State. The station is owned by Petitioner and will be operated to fuel vehicles owned by Petitioner as well as vehicles owned by Petitioner's customers. Petitioner has not previously been involved in the sale of compressed natural gas (CNG) for use by customers in motor vehicles. As a retail vendor of motor fuel, Petitioner plans to register with the applicable authorities as a vendor of alternative fuels (e.g., Petitioner anticipates registering for sales and use tax purposes and collecting the applicable sales tax on its sales of the CNG). Petitioner's income from fuel sales will be reported under the same employer identification number that he has used for all other business activities since 1989. Petitioner has been self-employed since 1989 and is currently involved in several businesses, including farming, mortgage and life insurance sales, and investments. However, the proceeds from the natural gas fueling station operation will be reported for federal personal income tax purposes on a separate Schedule C.

**Applicable law and regulations**

Section 606(a) of the Tax Law provides, in part:

Investment tax credit (ITC). (1) A taxpayer shall be allowed a credit, to be computed as hereinafter provided, against the tax imposed by this article. The amount of the credit shall be the per cent provided for hereinbelow of the investment credit base. The investment credit base is the cost or other basis, for federal income tax purposes, of tangible personal property and other tangible property, including buildings and structural components of buildings, described in paragraph two of this subsection, less the amount of the nonqualified nonrecourse financing with respect to such property to the extent such financing would be excludible from the credit base pursuant to section 46(c)(8) of the internal revenue code. . . .

(2)(A) A credit shall be allowed under this subsection with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are (i) 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.... For purposes of this subsection, the term "goods" shall not include electricity.

\* \* \*

(5) If the amount of credit allowable under this subsection for any taxable year shall exceed the taxpayer's tax for such year, the excess allowed for a taxable year commencing ... on or after January first, nineteen hundred eighty-seven and not deductible in such year may be carried over to the ten taxable years next following such taxable year and may be deducted from the taxpayer's tax for such year or years. In lieu of carrying over any excess, a taxpayer who qualifies as an owner of a new business for purposes of paragraph ten of this subsection may, at his option, receive such excess as a refund. Any refund paid pursuant to this paragraph shall be deemed to be a refund of an overpayment of tax as provided in section six hundred eighty-six of this article, provided, however, that no interest shall be paid thereon.

\* \* \*

(10) For purposes of paragraph five of this subsection, an individual who is either a sole proprietor or a member of a partnership shall qualify as an owner of a new business unless:

(A) the business of which the individual is an owner is substantially similar in operation and in ownership to a business entity taxable, or previously taxable, under section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five or one hundred eighty-six of article nine; article nine-A, thirty-two or thirty-three of this chapter; article twenty-three of this chapter or which would have been subject to tax under such article twenty-three (as such article was in effect on January first, nineteen hundred eighty) or the income (or losses) of which is (or was) includable under article twenty-two of this chapter whereby the intent and purpose of this paragraph and paragraph five of this subsection with respect to refunding of credit to new business would be evaded; or

(B) the individual has operated such new business entity in this state for more than five taxable years (excluding short years of the business).

## Opinion

Petitioner completed construction of a natural gas fueling station on June 1, 2006. The station will take uncompressed natural gas from the main in the street and compress it into onboard tanks in registered motor vehicles for use on the roads of New York State.

Section 606(a) of the Tax Law allows a taxpayer to claim an investment tax credit (ITC) against his or her personal income tax for purchases of certain new or used tangible personal property or other tangible property, including buildings and structural components of buildings. If the allowable amount of the ITC exceeds the taxpayer's tax for the year, the excess amount may be carried over to the 10 taxable years next following such taxable year and may be deducted from the taxpayer's tax for such year or years. However, in lieu of a credit carryover, a taxpayer who qualifies as an owner of a new business may elect to treat an ITC credit carryover as a refundable overpayment. For personal income tax purposes, an owner of a new business is defined as a sole proprietor or a partner of a partnership, unless the business which the taxpayer owns is substantially similar in operation and in ownership to a business entity taxable, or previously taxable, under Article 9-A; Article 32; Article 33; section 183, 184, 185 or 186 of Article 9; Article 22; or Article 23 or the taxpayer has operated the new business entity in New York State for more than five taxable years, excluding short tax years.

For purposes of this Advisory Opinion, it is assumed that the property purchased by Petitioner for the construction of the fueling station meets the criteria to qualify for the ITC. The issue raised is whether Petitioner's operation of the fueling station qualifies Petitioner as an owner of a new business for purposes of the ITC. Petitioner states that the proceeds from the natural gas fueling station operation will be reported for federal income tax purposes on a separate Schedule C. Petitioner's operation of the fueling station does not appear to be substantially similar to Petitioner's other business operations described in this Opinion. It appears, therefore, that Petitioner's business that takes uncompressed natural gas from the main in the street and compresses it into onboard tanks in motor vehicles is not substantially similar in operation and ownership to a business entity which the taxpayer owns that is currently taxable or previously taxable, as provided by section 606(a)(10)(A) of the Tax Law.

Accordingly, based on the facts submitted, it appears that Petitioner's natural gas fueling station operation will be considered a new business for purposes of section 606(a)(10) and, therefore, pursuant to section 606(a)(5) of the Tax Law, Petitioner is eligible for a refund of the excess ITC if the credit exceeds Petitioner's tax.

DATED: August 28, 2006

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

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