STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. I860520A

On May 20, 1986, a Petition for Advisory Opinion was received from Anthony J. Pieragostini, Box 120, Mt. Kisco, New York, 10549.

The issue raised is whether tangible personal property, such as machinery and equipment used in the food service industry for turning foods, milk and cheeses into finished foods and dinners for consumption by the general public, qualifies for an investment tax credit under section 606(a) of Article 22 of the Tax Law.

Petitioner is the owner of "Cheese World," a combination catering service and retail supplier of food. He asserts that since natural products or other edibles are processed, refined, cooked, beaten or mixed by the machines at issue to form a different edible product sold at retail, he is eligible for the investment credit.

Section 606(a) of the Tax Law provides for a credit against the personal income tax imposed by Article 22 based upon a percentage of 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, 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 or recovery property with respect to which a deduction is allowable under section 168 of the Internal Revenue Code;

3. has a useful life of four years or more;

4. is acquired by the taxpayer by purchase 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 or other specified activities.

This section defines "manufacturing" for the purposes of the credit as, "the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment."

Kitchen equipment principally used to prepare food served in a restaurant is ineligible for the investment tax credit because the preparation of food in a restaurant does not constitute the production of goods as contemplated by New York State Tax Law. The word "processing" refers to a type of industrial activity related to manufacturing and not to the preparation of food to be served in a restaurant. See: John F. and Sarah Mahoney, Decision of the State Tax Commission, April 1, 1976; General Mills Restaurant Group, Inc., Decision of the State Tax Commission, November 9, 1984, TSB-H-84(55)C. Take-out restaurants and catering services are similarly ineligible for the investment tax credit. Technical Services Bureau Memorandum TSB-M-78(1)C, April 7, 1978.

However, in addition to his catering business, Petitioner also sells processed food at retail. Machinery and equipment principally used to produce foods sold in bulk (rather than as individual servings) at retail will be deemed to be used in the production of goods by manufacturing. A machine is "principally" used in the production of good by manufacturing if more than fifty percent of its use is in a qualifying production process. If such machinery and equipment also meets criteria one through five, listed above, it will qualify for the investment tax credit.

Accordingly, if Petitioner's machinery and equipment are principally (more than 50%) used to produce restaurant meals, take-out meals or food used in a catering service, then the machinery and equipment will not qualify for the investment tax credit. However, if Petitioner's machinery and equipment is principally used to produce food sold in bulk at retail, then it is considered to be principally used in the production of good by manufacturing and will qualify for the investment tax credit if it also meets criteria one through five listed above.

DATED: September 26, 1986

s/Frank J. Puccia
Director
Technical Services Bureau

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