

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

TSB-A-05(2)C
Corporation Tax
TSB-A-05(1)I
Income Tax
January 4, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z040805A

On August 5, 2004, a Petition for Advisory Opinion was received from Reminick Aarons & Co., LLP, 1430 Broadway, 17th Floor, New York, New York 10018.

The issue raised by Petitioner, Reminick Aarons & Co., LLP, is whether medical equipment purchased to perform Lasik qualifies for the investment tax credit under section 606(a) of Article 22 of the Tax Law and section 210.12 of Article 9-A of the Tax Law.

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

Petitioner's client (Client) is a physician that performs Lasik. Lasik is a surgical procedure involving the use of laser beams to reshape the cornea of the human eye. Patients undergo the procedure because they have medical problems seeing clearly without eyeglasses or contact lenses. The most common problems are nearsightedness, farsightedness and astigmatism.

The machines used in this procedure involve a "Marco 3D Wavescan" and a "Wavelight Allegretto Excimer Laser." The Wavescan is used to determine the contour of the human cornea, the refractive prescription of the human eye and the total optical aberrations of the human eye. This information is then used to determine what is entered into the Excimer laser's computer. The Excimer laser is then used to reshape the cornea.

After the procedure is performed, the patient will be permanently free from wearing corrective lenses since the patient's corneas will be materially altered. Although the eye itself does not appear to have changed, the medical condition of the eye has changed substantially.

Applicable law and regulations

Section 210.12 of the Tax Law provides an investment tax credit for corporations under Article 9-A of the Tax Law, and provides, in part:

(a) 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 ... described in paragraph (b) of this subdivision, 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

* * *

(b)(i) A credit shall be allowed under this subdivision with respect to tangible personal property and other tangible property ... 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 (A) 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, (B) industrial waste treatment facilities or air pollution control facilities, used in the taxpayer's trade or business, (C) research and development property, (D) principally used in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale ... of stocks, bonds or other securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code, or of commodities as defined in section four hundred seventy-five (e) of the Internal Revenue Code, (E) principally used in the ordinary course of the taxpayer's trade or business of providing investment advisory services for a regulated investment company as defined in section eight hundred fifty-one of the Internal Revenue Code, or lending, loan arrangement or loan origination service to customers in connection with the purchase or sale ... of securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code, or (F) principally used in the ordinary course of the taxpayer's business as an exchange registered as a national securities exchange

Section 606(a) of the Tax Law provides an investment tax credit for taxpayers under Article 22 of the Tax Law, and provides, in part:

(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 ... 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....

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(2)(A) A credit shall be allowed under this subsection with respect to tangible personal property and other tangible property ... 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, (ii) industrial waste treatment facilities or air pollution control facilities, used in the taxpayer's trade or business, (iii) research and development property, (iv) principally used in the ordinary course of the taxpayer's trade or business as a broker or dealer in connection with the purchase or sale ... of stocks, bonds or other securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code, or of commodities as defined in section 475(e) of the Internal Revenue Code, or (v) principally used in the ordinary course of the taxpayer's trade or business of providing investment advisory services for a regulated investment company as defined in section eight hundred fifty-one of the Internal Revenue Code, or lending, loan arrangement or loan origination services to customers in connection with the purchase or sale ... of securities as defined in section four hundred seventy-five (c)(2) of the Internal Revenue Code....

Opinion

In this case, Client is a physician that performs Lasik on the human eye. While Lasik is a medical procedure that uses laser beams to reshape the cornea of the human eye, the procedure does not constitute the production of goods, and it does not constitute any of the other qualifying uses as contemplated in sections 210.12(b)(i) and 606(a)(2)(A) of the Tax Law. (see *Matter of Leisure Vue, Inc. v Comm T&F*, 172 AD2d 872; *Matter of General Mills Restaurant Group, Inc. v Chu*, 125 AD2d 762) Accordingly, Client may not claim an investment tax credit under sections 210.12 and 606(a) of the Tax Law for a "Marco 3D Wavescan" and "Wavelight Allegretto Excimer Laser" used in performing Lasik.

DATED: January 4, 2005

/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.