STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
INTERNATIONAL IMAGING MATERIALS, INC.	:	DECISION DTA No. 811355
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Year Ended March 31, 1990.	:	

Petitioner International Imaging Materials, Inc., 310 Commerce Drive, Amherst, New York 14228, filed an exception to the determination of the Administrative Law Judge issued on May 5, 1994. Petitioner appeared by Phillips, Lytle, Hitchcock, Blaine & Huber, Esqs. (James A. Locke and Martha L. Salzman, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on December 15, 1994, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioner is entitled to a refund of an investment tax credit as a "new" business under Tax Law § 210(12)(e) and (j).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The parties agreed to a written stipulation of facts which has been incorporated in the following Findings of Fact.

Petitioner, International Imaging Materials, Inc., is a Delaware corporation, with an office at 310 Commerce Drive, Amherst, New York 14228. Petitioner's taxpayer identification number is 13-3179629. Petitioner is engaged in the business of manufacturing and selling thermal transfer ribbons and other thermal transfer products.

Petitioner was incorporated in New York State on August 3, 1983. Petitioner filed its first New York State corporation franchise tax report for the short taxable year August 3, 1983 through March 31, 1984. During its taxable year ended March 31, 1985, petitioner placed in service certain machinery used in the manufacture and production of petitioner's products. Petitioner claimed an investment tax credit on its New York State corporation franchise tax report for its fiscal year ended March 31, 1985. The credit in the amount of $143,282.00 was claimed on line 1 of petitioner's Form CT-46 for such year. On Form CT-46.1 for its taxable year ended March 31, 1985, petitioner claimed a refund in the amount of $136,188.00, which represents the portion of petitioner's investment tax credit for such year that was not used to offset franchise tax otherwise due for the year ($143,282.00 - $7,094.00). For each of its taxable years ended March 31, 1986 through March 31, 1989, petitioner claimed an investment tax credit on its New York State corporation franchise tax report for the year and received a refund of the portion of its investment tax credit for each such year that was not used to offset franchise tax otherwise due for the year.

During its taxable year ended March 31, 1990, petitioner placed in service various production equipment used in the manufacture of thermal transfer ribbons, at a total cost to petitioner of $1,570,362.00.

On petitioner's New York State corporation franchise tax report for its taxable year ended March 31, 1990, petitioner claimed an investment tax credit on line 1 of Form CT-46 in the amount of $78,518.00 for such year. On Form CT-46.1 for its taxable year ended March 31, 1990, petitioner claimed a refund in the amount of $78,518.00, which represents the portion of petitioner's investment tax credit for such year that was not used to offset franchise tax

otherwise due for the year.

By letter dated November 5, 1990, the Audit Division of the New York State Department of Taxation and Finance ("Division") denied petitioner's refund request stating the following reason for its denial:

> "Article 9A, Section 210(12)(j) defines a new business as any corporation except a corporation that has been subject to tax under Article 9A for more than four (4) taxable years (excluding short periods) before the taxable year during which the taxpayer first becomes eligible for the investment tax credit; that is, the year for which the credit is allowed. Since your 3-31-90 Franchise Tax report reflects five (5) previous taxable periods (excluding short period ended 3-31-84), your refund request, as stated above, must be denied respectfully as the criteria is over extended. However, the balance of unused investment tax credit may be carried forward to offset the income of future years."

Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services. In a Conciliation Order dated September 25, 1992, the conciliation conferee denied petitioner's request and sustained the statutory notice.

On October 30, 1992, petitioner filed a petition for refund with the Division of Tax Appeals, alleging, inter alia, that its first New York franchise tax return was for the short taxable year August 3, 1983 through March 31, 1984, that it first became eligible for the New York investment tax credit during its taxable year ended March 31, 1985 and that, prior to the taxable year during which it first became eligible for the investment tax credit, it was not subject to tax under Article 9-A for any previous taxable year (excluding the short taxable year ended March 31, 1984).

The Division filed its Answer on December 31, 1992, affirmatively stating, inter alia, that because petitioner had been subject to tax under Article 9-A for more than four years prior to the year the investment tax credit was claimed, petitioner did not qualify for the credit authorized by Tax Law § 210(12)(e).

The parties stipulated that the sole issue for determination in this matter is whether, for purposes of Tax Law § 210(12)(j)(3), the phrase "taxable year during which the taxpayer first becomes eligible for the investment tax credit" refers to the taxable year during which petitioner first qualified to claim its first investment tax credit (i.e., petitioner's taxable year ended

March 31, 1985) or to the taxable year during which petitioner first qualified for the investment tax credit upon which petitioner's refund claim is based (i.e., petitioner's taxable year ended March 31, 1990). The parties agreed that if it is determined that such phrase refers to the taxable year during which petitioner first qualified to claim its first investment tax credit (i.e., petitioner's taxable year ended March 31, 1985), then petitioner is entitled to a refund of $78,518.00, plus accrued interest, but that if it is determined that such phrase refers to the taxable year during which petitioner first qualified for the investment tax credit upon which petitioner's refund claim is based (i.e., petitioner's taxable year ended March 31, 1990), then petitioner is not entitled to such refund.

OPINION

In 1981, the Legislature enacted a series of tax reforms for the purpose of encouraging business development in New York State (L 1981, ch 103; see Governor's Approval Memorandum for L 1981, ch 103, McKinney's Session Laws, pp. 2570-2571). One of the reforms was to augment the existing investment tax credit with a refund provision. Under the credit, any corporation subject to tax in New York which made a qualifying investment was allowed to reduce its tax liability to the amount of the minimum tax fixed by Tax Law § 210(1)(a) by applying the credit against its tax liability. Any unused credit could be carried forward to reduce tax in subsequent years (Tax Law § 210[12][e]). Under the new refund provision, effective for taxable years commencing on or after January 1, 1982, the corporation was entitled to receive the unused amount of the credit as a cash refund (Tax Law § 210[12][e]). The new refund provision was aimed at what the legislation termed a "new business." Apparently, it was felt that the refund would be a greater incentive to a new business than the credit since it would provide these new businesses with cash which could be utilized to finance the new business enterprise.

The Legislature decided that any corporation could be a "new business" except, as relevant in this case, a corporation which "has been subject to tax . . . for more than four taxable years . . . prior to the taxable year during which [it] first becomes eligible for the investment tax

credit" (Tax Law § 210[12][j][3]).

Petitioner asserts that even though it was incorporated in New York State in 1983 and filed its first New York State franchise report for the short taxable year August 3, 1983 through March 31, 1984, the investment it made in 1990 was an investment made by a "new business" and was subject to the refund provision. Petitioner's position is based on the fact that it made a qualifying investment for the investment tax credit in 1985 which was within the four-year period in the statute and that it, thus, qualified as a "new business" forever.

The Administrative Law Judge rejected petitioner's interpretation of the statute and determined that, because petitioner had been subject to tax for more than four years when it made the investment for which the refund was claimed, it was not a "new business" in 1990.

Specifically, the Administrative Law Judge determined that:

> "[g]iven the legislative purpose, the plain meaning of the words used and a contextual reading of the words in section 210(12)(j)(3), petitioner is not entitled to a refund of the investment tax credit for the taxable year ended March 31, 1990. Petitioner had been subject to tax under Article 9-A for more than four years prior to the year it first became eligible for the refund in question. This interpretation of the statutory language comports with the combined reading of paragraphs (e) and (j) of section 210(12)" (Determination, conclusion of law "D").

The core of the Administrative Law Judge's reasoning is that:

> "Paragraph (e) allows a taxpayer to carry over any amount of the investment tax credit not deductible in a taxable year to the 'following year or years.' Paragraph (e) also provides that, in lieu of the carryover, new businesses (as defined in paragraph [j]) may elect a refund. Paragraph (j), in turn, defines a 'new business' for purposes of paragraph (e). The reference to an investment tax credit as a measure of the four-year period contained in section 210(12)(j)(3) relates back to the investment tax credit in paragraph (e) for which the business seeks a refund, and not an investment tax credit unrelated to the refund in question. Indeed, petitioner's reading of the words used in the statute would require the insertion of the word 'first' next to the words 'investment tax credit.' In the statute itself, the word 'first' is only used as a modifier to the words 'becomes eligible.' Thus, a literal reading of the words used supports the interpretation that the word 'first' refers to the 'first' time the business became entitled to the the credit for which it currently was claiming a refund under paragraph (e) and not the business' 'first' investment tax credit since its incorporation. This four-year period provides a time limitation to the term 'new,' recognizing that the credit in question may have been carried over from a year prior to the one in which the business

> seeks to convert the credit into a refund.[1] Thus, if petitioner was first eligible for the credit in 1988 but did not opt for a refund and instead carried over the credit into 1989 and 1990, it would be entitled to a refund in 1990 if there was still a credit remaining after taxes for 1990 because in 1988 the four-year period had not expired. Under the facts in this case, petitioner first became eligible for the investment tax credit, for which it sought refund in 1990, in 1990. Therefore, because it first became entitled to the credit in 1990, it was not entitled to the refund as a 'new' business" (Determination, conclusion of law "D").

The Administrative Law Judge concluded by noting that:

> "petitioner's interpretation of section 210(12)(j) would permit refunds, based on any number of investment tax credits, to businesses for an indefinite number of years as long as its eligibility for its first investment tax credit occurred prior to the four-year limitation period. This interpretation would preserve for an unlimited period of time a business' status as 'new' -- an interpretation that defies any common-sense understanding of the term 'new' business or firm. Petitioner's interpretation and criticism that the Division equates the term 'new' business with the term 'young' business has no basis in the statute or in the stated legislative purpose" (Determination, conclusion of law "F").

The Administrative Law Judge also rejected petitioner's assertion that the absence from section 210(12)(j)(3) of the phrase "for which the refund is claimed," when compared to the inclusion of the same phrase in section 606(a)(10)(c), indicates that the Legislature intended a different interpretation of what constitutes a new business in the two statutes. The Administrative Law Judge determined that:

> "[t]he inclusion of the phrase -- 'for which the refund is claimed' -- in section 606(a)(10)(c) merely clarifies the provision taking into account a second variable that does not exist under section 210(12); that is, the refund is allowed to an individual taxpayer (rather than a corporation under the franchise tax law) with respect to a second entity -- a new business. There is no second entity involved under section 210(12)(j) because the business itself is the taxpayer. The phrase added to section 606(a)(10) -- 'for which the refund is claimed' -- is immediately followed by the phrase 'with respect to such new business entity.' The phrase therefore clarifies the relationship between the individual taxpayer, the particular investment tax credit and the new business entity. Such clarification is unnecessary in section 210(12) for the reasons stated above and, in any event, the inclusion of the phrase in section 606(a)(10) does not indicate that the Legislature intended that section 210(12)(j) was to be interpreted in a different manner" (Determination, conclusion of law "E").

On exception, petitioner makes the same substantive arguments as at hearing and asserts

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[1] As noted above, paragraph (e) permits a carryover of the credit to the following year or years.

that the Administrative Law Judge erred in her determination. Petitioner asserts that:

> "[a]s used in Section 210(12)(j)(3) of the Tax Law, the phrase 'taxable year in which the taxpayer first becomes eligible for the investment tax credit' clearly refers to the year in which a taxpayer qualifies to claim its first investment tax credit. This interpretation . . . is required by the literal language of the statute and a comparison of the language of Section 210(12)(j)(3) with the language of Section 606(a)(10)(C), which was enacted at the same time . . . . Moreover, the conclusion that the taxable year referred to in Section 210(12)(j)(3) is the taxable year in which a taxpayer qualifies to claim its first investment tax credit is consistent with the purpose for which the refund provision was enacted" (Petitioner's brief, pp. 13-14).

Petitioner asserts that the Administrative Law judge erred in her interpretation that the term "first," as used in section 210(12)(j)(3), refers to the first time the corporation became entitled to the credit for which it currently was claiming a refund. Specifically, petitioner asserts that:

> "[t]he Administrative Law Judge supported this conclusion with the erroneous statement that the taxpayer may be claiming a refund of a credit that has been carried over from a year prior to the year in which the taxpayer seeks to convert the credit into a refund.
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> * * *
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> "The Administrative Law Judge's interpretation of the refund provision is wrong for two reasons. First, this interpretation would permit a taxpayer to claim a refund of a prior year's unused investment tax credit on a later year's return, which is not permitted by the statute. Moreover, this interpretation is contrary to the Department's interpretation of the refund provision as evidenced by the Department's applicable forms. Second, the Administrative Law Judge's interpretation would result in a taxpayer being treated as a 'new business' with respect to some, but not all, of its available investment tax credit for a year. Such disparate treatment of a taxpayer is simply not contemplated by the statute" (Petitioner's brief, pp. 16-17).

Finally, petitioner asserts that the Administrative Law Judge erred in distinguishing section 606(a)(10)(C) from section 210(12)(j):

> "[t]he Administrative Law Judge appears to argue that the phrase 'for which the refund is claim [sic]' as used in Section 606(a)(10)(C) clarifies only the phrase which immediately follows it (i.e., the phrase 'with respect to such new business entity'). However, given its placement in the statute, the phrase 'for which the refund is claimed' clarifies the investment tax credit to which it refers and is itself clarified by reference to the applicable business entity. If the legislature intended the phrase 'for which the refund is claimed' only to clarify the phrase 'with respect to such new business entity', it would have been more appropriate to have the former phrase follow the latter, so that Section 606(a)(10)(C) would read, in part, as

> follows: '. . . the investment tax credit with respect to such new business entity for which the refund is claimed.' The legislature did not choose to structure the statute in that order and it would be inappropriate to so reorder the words of the statute. The existence and position of the phrase 'for which the refund is claimed' in Section 606(a)(10)(C) and its absence from Section 210(12)(j)(3) clearly indicate that investment tax credit referred to in Section 210(12)(j)(3) is not the investment tax credit for which the refund is claimed" (Petitioner's brief, pp. 22-23).

The Division, in response, argues as it did at hearing, namely, that its interpretation of a "new business" under the statute is consistent with the legislative intent of the statute "to assure continued economic growth." For that reason, contends the Division, the investment tax credit is refundable during the critical five-year start-up period of a business. The Division notes that nowhere in the legislative history is there any mention of a "long-term" investment tax credit refund initiative and that petitioner's definition of the term "new" business would permit refunds for an indefinite period of time. The Division further points out that the absence of the qualifying phrase -- "for which the refund is claimed" -- is immaterial because inasmuch as "the objective [of the statute] is to determine the eligibility of the refund being claimed, it goes without saying that the paragraph at issue refers to the same investment tax credit" (Division's brief, p. 11.)

We deal first with petitioner's assertions concerning the Administrative Law Judge's resolution of the language difference between section 210(12)(j)(3) and section 606(a)(10)(c). We affirm the determination of the Administrative Law Judge for the reasoning set forth in her determination.

We deal next with petitioner's assertion that the Administrative Law Judge erred in her interpretation of section 210(12)(j)(3). We are not persuaded by petitioner's argument.

We agree with the Administrative Law Judge's reasoning that the credit in paragraph (e) relates to a specific qualifying investment; that the option in paragraph (e) of seeking a refund of the unused portion of the credit relates to the same qualifying investment; and that the reference to the investment tax credit in paragraph (j) to mark the four-year period relates back to the same qualifying investment in paragraph (e) for which the corporation is seeking a refund, not any other investment tax credit. Thus, it is only qualifying investments made before

the corporation has been subject to tax for more than four taxable years which qualify for the refund. We are not persuaded by petitioner's argument that the language of the statute leads to the result that an investment made in the four-year period automatically makes all subsequent qualifying investments eligible for the refund. The appellation "new business" does not, as petitioner suggests, alter the basic operating principle of the statute. The crux of the matter is that it is a particular investment which is eligible for the credit and the refund. The fact that one investment is eligible for the credit and the refund does not mean that subsequent investments that qualify for the credit are automatically eligible for the refund. The refund provision adds a qualification for the investment to be eligible for a refund, namely, that it be made within four years after the corporation becomes subject to the tax.

We also agree with the Administrative Law Judge's reasoning that the result petitioner seeks to achieve from its interpretation of the statute would require that the term "first" be used twice in paragraph (j); once, as it is currently used, to modify "becomes eligible," i.e., "first becomes eligible for the investment tax credit"; and a second time, to modify "investment tax credit," i.e., "first becomes eligible for the first investment tax credit." The implied insertion of the second "first" by petitioner produces a result not evidenced by the literal wording of the statute.

Finally, we are not persuaded by petitioner's argument that the statute does not "permit" a taxpayer to obtain a refund of a prior year's credit on a later year's return. The Administrative Law Judge concluded that it did. The fact of the matter is that the statute is silent on the matter. Whether, as petitioner asserts, the Administrative Law Judge's conclusion is "contrary to the [Division's] interpretation of the refund provision as evidenced by the [Division's] applicable forms" CT-46 and CT-46.1 is not clear since the Division has interpreted the section to allow a taxpayer to obtain a refund of a prior year's credit on a later year's return (see, Advisory Opinion TSB-A-92[12]C). In any event, we do not view this portion of the Administrative Law Judge's determination as necessary to the conclusion reached in her determination. In other words, the meaning of paragraph (j) is not dependent on whether a refund of a prior year's credit is

permitted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of International Imaging Materials, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of International Imaging Materials, Inc. is denied.

DATED: Troy, New York
June 8, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner