STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
INTERNATIONAL IMAGING MATERIALS, INC.	:	DETERMINATION 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 a petition 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.

On August 26, 1993 and August 31, 1993, respectively, petitioner, represented by Phillips, Lytle, Hitchcock, Blaine and Huber (Martha L. Salzman, Esq., of counsel), and the Division of Taxation, represented by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel), signed an agreement consenting to have the controversy determined on submission without a hearing. All briefs and documents were due by December 31, 1993. Petitioner filed a brief on October 20, 1993. The Division of Taxation filed a brief on November 24, 1993 and petitioner filed a reply brief on December 31, 1993. After review of all evidence submitted, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

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

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.

CONCLUSIONS OF LAW

A. Tax Law § 210.12(e) allows an investment tax credit to be applied against the corporation franchise tax and allows a carryover of credit to the following year or years of any amount of credit not deductible in the taxable year. However, that section also provides that:

> "[i]n lieu of such carryover, any such taxpayer which qualifies as a new business under paragraph (j) of this subdivision may elect to treat the amount of such carryover as an overpayment of tax to be credited or refunded . . ." (emphasis added).

Paragraph (j) defines a "new business" as any corporation, except a corporation which:

> "(3) has been subject to tax under this article for more than four taxable years (excluding short taxable years) prior to the taxable year during which the taxpayer first becomes eligible for the investment tax credit."

B. Petitioner argues that it qualifies as a "new business" because it was not subject to tax under Article 9-A for more than four taxable years prior to the taxable year during which it first became eligible for the investment tax credit which occurred in the taxable year ended March 31, 1985. Petitioner asserts that a literal reading of the phrase "taxable year during which the taxpayer first becomes eligible for the investment tax credit" clearly refers to the taxable year in which a taxpayer first qualifies to claim its first investment tax credit and not the taxable year in which a taxpayer first becomes eligible to claim the investment tax credit for which the refund is claimed. Petitioner contends that if the Legislature had intended the latter interpretation of the phrase, then it would have added the qualifying language -- "for which the refund is claimed" -- which it did when it enacted Tax Law § 606(a)(10)(c).[1] In contrast to

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[1]Tax Law § 606(a)(5) allows a comparable investment tax refund credit with respect to personal income taxes for a taxpayer who qualifies as an owner of a new business. Similarly,

section 606(a)(10)(c), argues petitioner, the failure of the Legislature to add this qualifying language in section 210.12(j)(3) is confirmation of the correctness of petitioner's interpretation of the statute. Petitioner further argues that the Division's interpretation of the statute is inconsistent with the legislative purpose of encouraging long-term investment and continued economic growth in the State of New York. Petitioner contends that:

> "[t]he refund provision was designed to encourage investments by businesses that had not been subject to the tax for more than four years before making their first investment tax credit eligible investment in the State. For example, a business subject to tax under Article 9-A throughout the 1970's could not claim the refund . . . ." (Petitioner's reply brief, p. 10.)

Finally, petitioner argues that the Division incorrectly equates the term "new" business with the term "young" business.

C. In its brief, the Division argues 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.)

D. In interpreting a provision of a statute, an attempt should be made to "effectuate the

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Tax Law § 606(a)(10)(c) provides that an individual who is either a sole proprietor or a member of a partnership may qualify as an owner of a new business unless:

> "the individual has operated such new business entity for more than four years prior to the first day of the taxable year during which such individual first becomes eligible for the investment tax credit for which the refund is claimed with respect to such new business entity" (emphasis added).

intent of the Legislature, and where the statutory language is clear and unambiguous, the courts should construe it so to give effect to the plain meaning of the words used" (Matter of 1605 Book Center v. Tax Appeals Tribunal, ___ NY2d ___ [decided February 15, 1994], quoting Doctors Council v. New York City Employees' Retirement Sys., 71 NY2d 669, 674-675, quoting Patrolmen's Benevolent Assn. v. City of New York, 41 NY2d 205, 208). However, when reasonable minds differ as to the perceived meaning of the words used in a statute, the context in which the words are used and the objectives sought to be achieved by the enactment of the statute should be examined (id., citing Matter of Petterson v. Daystrom Corp., 17 NY2d 32, 38, 268 NYS2d 1).

In the Governor's Memorandum approving chapter 103 of the Laws of 1981, which added the refund provision in section 210.12(e) and the definition of a "new business" in section 210.12(j), the stated purpose of these amendments to Article 9-A was to expand and enrich various investment incentives "to assure continued economic growth in the State by providing . . . an expansion of the [investment tax] credit to certain retail investments, with provision for a refund of the credit to new firms" (1981 McKinney's Session Laws of NY, at 2571).

Given 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.

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.[2] 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.

E. Petitioner claims that the absence of the phrase "for which the refund is claimed" from section 210.12(j)(3), when compared to the inclusion of the same phrase in section 606(a)(10)(c), clearly indicates that the Legislature intended a different interpretation of what constitutes "new" in the two statutes. I disagree. Section 606(a)(5) allows individual taxpayers to carry over an investment tax credit to the following seven taxable years and also permits a refund in lieu of the carryover if the taxpayer qualifies as an owner of a new business under paragraph (10). Paragraph (10) provides that, for purposes of paragraph (5) of that 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:
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> * * *

[2]As noted above, paragraph (e) permits a carryover of the credit to the following year or <u>years</u>.

> "(c) the individual has operated such new business entity for more than four years prior to the first day of the taxable year during which such individual first becomes eligible for the investment tax credit for which the refund is claimed with respect to such new business entity" (emphasis added).

The 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.

F. As noted by the Division, 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.

G. In questions of statutory construction, petitioner must show not only that its interpretation of the law is plausible, but also that its interpretation is the only reasonable construction available (Matter of Custom Shop 5th Ave. Corp. v. Tax Appeals Tribunal, 195 AD2d 702, 600 NYS2d 295, 297). In sum, the Division's interpretation of the statute is reasonable and logically flows from the plain meanings of the words used as well as a

contextual reading of paragraphs (e) and (j) of section 210.12. Furthermore, petitioner's claim that the Division's interpretation contradicts the legislative purpose of encouraging continued economic growth has no merit. The Division's interpretation still permits businesses to carry over the investment tax credit, but reserves the added benefit of the refund in lieu of the carryover to "new" firms that have not been subject to the franchise tax for more than four years.

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

DATED: Troy, New York
May 5, 1994

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE