STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C921007B

On October 7, 1992, a Petition for Advisory Opinion was received from Milton Roy Company, 4949 Harrison Avenue, Rockford, Illinois 61125.

The issue raised by Petitioner, Milton Roy Company, is how to treat for corporation franchise tax purposes an investment tax credit carryover generated by a division of Petitioner, when all of the division's assets and liabilities are transferred to a subsidiary of Petitioner.

Petitioner has nexus in New York State and files corporation franchise tax returns. Petitioner has six divisions: FCD, APD, HTL, PAD, CEL, and Corporate. The APD division is a manufacturing facility in Rochester, New York. Petitioner has a New York investment tax credit carryover available in the amount of $241,000. This New York investment tax credit carryover was generated entirely by the APD division of Petitioner. SLM Instruments, Inc. located in Champaign, Illinois is a wholly-owned subsidiary of Petitioner. Petitioner plans to transfer all of the assets and liabilities of its APD division to SLM Instruments, Inc. This transfer will be made in compliance with the provisions of section 351 of the Internal Revenue Code of 1986, as amended (hereinafter "IRC"). In addition, the proposed transaction will be a reorganization under section 368 of the IRC and section 381(a) of the IRC will apply. The proposed transaction will not constitute a purchase pursuant to section 179(d) of the IRC. APD will remain in Rochester, New York as a manufacturing facility after its assets are transferred to SLM Instruments, Inc. SLM Instruments, Inc. will remain in Champaign, Illinois. No assets of APD will be moved from Rochester, New York to Champaign, Illinois.

Section 210.12(g) of the Tax Law and section 5-2.8(a) of the Business Corporation Franchise Tax Regulations (hereinafter "Article 9-A Regulations") provide that if property on which investment tax credit has been claimed is disposed of or ceases to be in qualified use prior to the end of its useful life, the difference between the credit taken and the credit allowed for actual use must be added back to the tax otherwise due in the year of disposition or disqualification.

Section 5-2.8(e) of the Article 9-A Regulations provides that:

> a disposition does not occur where property is transferred from a corporation as part of a transaction to which section 381(a) of the Internal Revenue Code applies; e.g., a complete liquidation of a subsidiary under section 332 of the Internal Revenue Code, or a reorganization under section 361 and section 368(a)(1)(A) (statutory merger or consolidation), section 368(a)(1)(C) (certain acquisitions of property from one corporation by another), section 368(a)(1)(D) (certain transfers of assets), section 368(a)(1)(F) (mere change in identity, form or place of organization, however effected) or section 368(a)(1)(G) (bankruptcy reorganizations).

> As there is no disposition in these cases, an add back is not required provided that the property continues in qualified use and is acquired by a corporation subject to tax under article 9-A. Generally, in these cases, the acquiring or surviving corporation cannot claim an investment tax credit because it takes over such property at the adjusted basis of the transferor and the transfer therefore does not qualify as a purchase pursuant to Internal Revenue Code, section 179(d)(2). If the property in the hands of the acquiring corporation is not in qualified use for its entire life or for more than 12 consecutive years, a recovery from the acquiring corporation is required. In measuring the period of qualified use, the period during which the property was held by the transferor corporation and the acquiring corporation are to be taken into account.

Section 351(a) of the IRC states: "[n]o gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such person or persons are in control las defined in section 368(c)) of the corporation."

A tax-free transfer pursuant to section 351 of the IRC, that for federal income tax purposes does not require the recapture of the investment tax credit taken on section 38 of the IRC property, does not constitute a "disposition" as contemplated in section 210.12(g) of the Tax Law. See Coats & Clark Inc., Adv Op Comm T & F, August 11, 1988, TSB-A-88(16)C. Where a disposition does not occur, a recapture of the investment tax credit taken is not required and an investment tax credit carryover is not lost.

Herein, Petitioner's proposed transaction is similar to Coats & Clark Inc., supra, in that it is a tax free transfer under section 351 of the IRC. Additionally, Petitioner states that the proposed transaction will be a reorganization under that section 368 of the IRC and that section 381(a) of the IRC will apply. Accordingly, Petitioner's proposed transaction will not be a "disposition" for purposes of section 210.12(g) of the Tax Law and section 5-2.8 of the Article 9-A Regulations and any investment tax credit taken with respect to such property will not be required to be recaptured by Petitioner in the year of the proposed transaction.

There is no specific provision contained in either the Tax Law or the Regulations promulgated thereunder with respect to the effect of the proposed transaction on the investment tax credit carryover that Petitioner has been allowed pursuant to section 210.12(e) of the Tax Law.

Herein, the language of section 210.12(g) of the Tax Law is parallel to that contained in section 50 of the IRC. Therefore, when determining the effect of the proposed transaction on the investment tax credit carryover pursuant to section 210.12(e) of the Tax Law, it is appropriate to apply precedent set under the IRC for federal income tax purposes.

Section 381(a) of the IRC states that:

> GENERAL RULE.--In the case of the acquisition of assets of a corporation by another corporation--
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> . . .
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> (2) in a transfer to which section 361 (relating to nonrecognition of gain or loss of corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of section 368(a)(1),
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> the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution or transfer, the items described in subsection (c) of the distributor or transferor corporation, subject to the conditions and limitations specified in subsections (b) and (c). For purposes of the preceding sentence, a reorganization shall be treated as meeting the requirements of subparagraph (D) or (G) of section 368(a)(1) only if the requirements of subparagraphs (A) and (B) of section 354(b)(1) are met.

Section 381(c) of the IRC states that:

> ITEMS OF THE DISTRIBUTOR OR TRANSFEROR CORPORATION.--The items referred to in subsection (a) are:
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> . . .
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> (24) CREDIT UNDER SECTION 38.--The acquiring corporation shall take into account (to the extent proper to carry out the purposes of this section and section 38, and under such regulations as may be prescribed by the Secretary) the items required to be taken into account for purposes of section 38 in respect of the distributor or transferor corporation ....

Petitioner states that section 381(a) of the IRC will apply to Petitioner's proposed transaction to transfer the assets of the APD division to SLM Instruments, Inc. Accordingly, for federal income tax purposes, any unused investment tax credit that Petitioner has been allowed as a carryover on section 38 property that is included in the transfer will follow the property and will be allowed as an investment tax credit carryover for SLM Instruments, Inc. Further, if a recapture of the investment tax credit taken on such section 38 property is required, SLM Instruments, Inc., will be required to make the recapture.

Accordingly, herein, Petitioner's proposed transaction will result in Petitioner's loss of the investment tax credit carryover attributable to such transferred assets computed pursuant to section 210.12(e) of the Tax Law. However, such investment tax credit carryover will follow the property that generated such credit carryover and will be allowed as an investment tax credit carryover pursuant to section 210.12(e) of the Tax Law for SLM Instruments, Inc.

Further, if, pursuant to Petitioner's proposed transaction, the property transferred to SLM Instruments, Inc. is not in qualified use for its entire life or for more than 12 consecutive years, a recovery from SLM Instruments, Inc. will be required pursuant to section 5-2.8(e) of the Article 9-A Regulations. In measuring the period of qualified use, the period during which the property was held by Petitioner and SLM Instruments, Inc. would be taken into account.

DATED: February 10, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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