

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

LEISURE VUE, INC.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Fiscal
Years Ended October 31, 1980, October 31, 1981
and October 31, 1982.

DECISION
DTA #802041

Petitioner, Leisure Vue, Inc., 811 South Main Street, Spring Valley, New York 10977, filed an exception to the determination of the Administrative Law Judge issued on November 19, 1987 with respect to its petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended October 31, 1980, October 31, 1981 and October 31, 1982 (File No. 802041). Petitioner appeared by Paul G. Sessler, Esq. The Audit Division appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of Counsel).

Petitioner submitted a brief on exception, the Division did not. Oral argument at the request of petitioner was heard on March 8, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is entitled to the investment tax credit against corporation franchise tax provided for in section 210.12(b) of the Tax Law on the purchase of certain equipment known as "down-converters".

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows.

On February 4, 1985 the Division of Taxation issued three statements of audit adjustment to Leisure Vue, Inc. (hereinafter "Leisure Vue"). The explanation on the first statement set forth the following:

"New York State Tax Law, Section 210.12(6) [sic] states in part, 'a credit shall be allowed under the section with respect to tangible personal property and other tangible property,... principally used by the taxpayer in the production of goods by manufacturing, processing, assembling,... for purposes of this paragraph, manufacturing shall mean 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 similar equipment.'

"Since the property on which the investment tax credit was claimed is not principally used in the production of goods, your investment tax credit has been disallowed."

The second and third statements refer to this explanation. The amount of tax deficiency on each statement of audit adjustment represented the investment tax credit claimed by petitioner in each of the years in issue. Based on the disallowance of such credits, on February 4, 1985 the Division of Taxation issued notices of deficiency assessing tax and interest for the fiscal years ended October 31, 1980, 1981 and 1982.

Leisure Vue is engaged in the business of providing pay television installation and service to subscribers. It provides subscribers with a program guide and bills them for services. It also maintains a fully-staffed office. Most significantly, petitioner acts as a "down-converter", redirecting and modifying an electromagnetic signal. The process of down-conversion refers to the reduction in megacycles in a spectrum, in this instance from a 2,150 megacycle spectrum to a 50 to 216 megacycle spectrum. Petitioner does not originate the signal nor the programs which are broadcast through the signal.

The equipment for which petitioner claims an investment tax credit for the years in question includes only that machinery and equipment used in the down-conversion process. It does not include office and transportation equipment. The assets for which petitioner has claimed the

investment tax credit are depreciable pursuant to section 167 of the Internal Revenue Code, have a useful life of four years or more, are acquired by purchase as defined in section 179(d) of the Internal Revenue Code, and have a situs in the State of New York.

Petitioner filed form CT-46, Claim for Investment Tax Credit, for each of the periods in issue. On each schedule there was listed an item called "machinery and equipment" which included the down-conversion equipment. The claims were as follows:

<u>Fiscal Year Ended</u>	<u>Property</u>	<u>Principal Use</u>	<u>Investment Tax Credit Claimed</u>
10/31/80	Machinery & Equipment	Income	\$4,159.77
10/31/81	Machinery & Equipment	Income	2,484.77
10/31/82	Machinery & Equipment	Income	1,941.29

Since all other claims for investment tax credit for the years in issue have been abandoned by petitioner, those listed above for machinery and equipment are the only claims remaining in issue. The machinery and equipment that is listed on the form CT-46 includes antennae, decoder boxes, band separators, down-converters, power supplies, jumper cables, preamplifiers, channelizers and installation supplies.

In addition, we find, as requested by the petitioner in its exception, that the assets at issue for which petitioner claimed the investment tax credit were tangible personal property within the meaning of section 210.12(a) of the Tax Law.

OPINION

The sole issue in this case is whether petitioner's equipment was principally used by petitioner in the production of goods by inter alia manufacturing as prescribed in section 210.12(b) of the Tax Law. The burden of proof on this issue is on the taxpayer (Matter of General Mills Restaurant Group, Inc. v. Chu, 125 AD2d 762, at 763-764).

The relevant language of section 210.12(b) of the Tax Law provides:

"A credit shall be allowed under this section with respect to tangible personal property and other tangible property . . . which are . . . principally used by the taxpayer in the production of goods by manufacturing For purposes of this paragraph, manufacturing shall mean the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter" (Section 210.12[b] of the Tax Law [emphasis added].)

The Administrative Law Judge determined that petitioner was not engaged in production by manufacturing since the process used by petitioner did not give the article new shape, new quality or new combination; the product which resulted from the down-conversion process was essentially identical to the one it received from the originating source of the signal, i.e., electromagnetic waves; and the electromagnetic waves at issue were neither goods nor matter within the meaning of the statute.

Petitioner takes exception to the conclusion that electromagnetic waves did not constitute goods and matter as well as to the conclusion that the change they underwent was insignificant. Petitioner argues that even though the electromagnetic waves were intangible they may still qualify as both goods and matter and that the change the electromagnetic waves underwent was significant since their resulting function was different from their function prior to the down-conversion. We affirm the determination of the Administrative Law Judge.

The terms "goods" and "matter" are not defined by the Tax Law nor in regulation. The legislative memorandum accompanying the enactment of the section offers no elucidation of the term but merely states the purpose of the section is to encourage modernization of production facilities in the State. (Memorandum of Tax Structure Study Committee, 1969 NY Legis Ann at 447; Matter of General Mills Restaurant Group, Inc. v. Chu, *supra*.) The case law does not explicitly deal with the meaning of either term in the context of section 210.12(b) or in the parallel income tax provisions of section 606(a)(2) of the Tax Law.

Under these circumstances the words must be construed "as an ordinary person might understand them." (Matter of Building Contractors Ass. v. Tully, 87 AD2d 909 [1981]; Matter of Business Statistics Organization, Inc. v. Lizards Joseph, Comptroller of the City of New York, 299 NY 443 [1949]; McKinney's Cons Laws of New York, Book 1, Statutes §313a.)

Dictionary definitions of both "goods" and "matter" generally embrace something tangible as opposed to something intangible. (See, e.g., Webster's New Unabridged Collegiate Dictionary 1000 [9th ed 1987]; Webster's New Universal Dictionary, [2nd ed 1983].) The State Tax Commission consistently interpreted these terms in this fashion. (See, Richard H. Roberts, State Tax Commn.

Advisory Opinion, TSB-H-81[57]I, use of electronic equipment to place visual and audio images on blank tapes to produce educational video tapes for industrial and commercial use; Matter of Multimode, Inc., State Tax Commn., May 20, 1983, TSB-H-83[23]C, use of computers to transfer names and addresses from hard copy including order blanks and invoices to magnetic tape according to criteria such as income or geography; Matter of Epic Chemicals, State Tax Commn., October 30, 1981, TSB-H-81[59]C, use of typewriters and copying machines to produce labels.) In each of these situations, the "matter" acted upon was tangible property (e.g., blank tape) and the result was production of a tangible "goods" (e.g., educational tape).

The petitioner has failed to prove that the down-conversion process had the tangible attributes necessary to bring it within the purview of the statute. The electromagnetic waves were not "matter" within the meaning of the statute, nor was the result of the down-conversion "goods" within the meaning of the statute.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Leisure Vue, Inc. is granted to the extent that the finding of fact is made that the equipment at issue was tangible personal property within the meaning of section 210.12(a) of the Tax Law and except as so granted is in all other respects denied;
2. The determination of the Administrative Law Judge is modified as indicated in paragraph "1" above and except as so modified is in all other respects affirmed; and
3. The petition of Leisure Vue, Inc. is denied and the notices of deficiency dated February 4, 1985 are sustained in full.

DATED: Albany, New York
August 19, 1988

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

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

