

STATE OF NEW YORK
 DIVISION OF TAX APPEALS

In the Matter of the Petition :
 of :
 LEISURE VUE, INC. : DETERMINATION

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.

Petitioner, Leisure Vue, Inc., 811 South Main Street, Spring Valley, New York 10977, 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 years ended October 31, 1980, October 31, 1981 and October 31, 1982 (File No. 802041).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 7, 1987 at 1:15 P.M. Petitioner appeared by Paul G. Sessler, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. On February 4, 1985 the Audit Division issued three statements of audit adjustment to Leisure Vue, Inc. (hereinafter "Leisure Vue") which set forth the following:

<u>Period Ended</u>	<u>Tax Deficiency</u>	<u>Interest</u>	<u>Total</u>
10/31/80	\$ 1,974.40	\$ 1,212.34	\$ 3,186.74
10/31/81	7,556.00	3,561.41	11,117.41
10/31/82	3,689.60	1,001.32	4,690.92

The explanation on the statement issued for the period ended October 31, 1980 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 other 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 statements for the periods ended October 31, 1981 and October 31, 1982 refer to this explanation. The amount of the tax deficiency on each statement of audit adjustment represented the investment tax credit claimed by petitioner in each of the years in issue.

2. On February 4, 1985 the Audit Division also issued notices of deficiency pursuant to Article 9-A of the Tax Law for the periods ended October 31, 1980, 1981 and 1982. The information set forth on said notices was as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total Due</u>
10/31/80	\$1,974.40	\$1,212.34	\$ 3,186.74
10/31/81	7,556.00	3,561.41	11,117.41
10/31/82	3,689.60	1,001.32	4,690.92

3. 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.

4. 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.

5. 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.

6. 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>Investment Tax Property</u>	<u>Principal Use</u>	<u>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.

7. 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.

CONCLUSIONS OF LAW

A. That Tax Law § 210.12(b) provides an investment tax credit to corporations with respect to tangible personal property which is depreciable pursuant to section 167 of the Internal Revenue Code, has a useful life of four years or longer, is acquired by purchase as defined in section 179(d) of the Code, has a situs in New York and is "principally used by the taxpayer in the production of goods by manufacturing, processing, assembling...."

B. That Tax Law § 210.12(b) defines manufacturing as follows:

"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 other similar

equipment."

Petitioner argues that the process of down-conversion whereby it transforms a 2,150 megacycle spectrum to a 50 to 216 megacycle spectrum is a process which gives a new shape to matter as defined in the statute.

C. 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 within the meaning of Tax Law § 210.12(b).

D. That, additionally, the down-conversion process utilized by petitioner did not result in a product which was significantly different from the signal received from the originating source so that the operation could be deemed "manufacturing" (Matter of J.H. Wattles, Inc., State Tax Commission, October 30, 1981). Since petitioner merely converted the band width from 2,150 megacycles to a band width of 50 to 216 megacycles the product was essentially identical to the one it received from the originating source of the signal.

E. That the down-conversion operation performed by petitioner cannot be construed as "processing" as that term is used in Tax Law § 210.12(b). The State Tax Commission has defined "processing" as an operation whereby raw material is subjected to some special treatment, either artificially or naturally, which results in a transformation or alteration of the raw material's form, state or condition (Matter of Hudson Cold Storage And Freezer Corp., State Tax Commission, September 9, 1983). Petitioner's process of reducing the 2,150 megacycle spectrum to a 50 to 216 megacycle spectrum does not fall within the intent of Tax Law Section 210.12(b). The language of the section itself indicates the credit was intended for machinery and equipment used principally in the production of goods. The section also intended for the manufacturing process to include working raw materials thereby giving new shape, quality or combinations to matter. The electromagnetic waves by which light and sound are transmitted are neither goods nor matter as those terms are used in Tax Law § 210.12(b). In fact, the cases cited by petitioner in support of its position, including Multimode, Inc. (State Tax Commission,

May 20, 1983), Continental Terminals, Inc. (State Tax Commission, March 5, 1982), and Epic Chemicals, Inc. (State Tax Commission, October 30, 1981) all involve processes performed on goods or physical matter resulting in a transformation or alteration of the raw material's form, state or condition.

F. That the petition of Leisure Vue, Inc. is hereby denied, and the notices of deficiency dated February 4, 1985 are sustained in full, together with such additional interest as be lawfully owing.

DATED: Albany, New York
November 19, 1987

ADMINISTRATIVE LAW JUDGE