STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
3M CARTING, INC.	:	DETERMINATION DTA NO. 810321
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 August 31, 1982 and July 31, 1984.	:	

Petitioner, 3M Carting, Inc., 311 Winding Road, Old Bethpage, New York 11804, 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 August 31, 1982 and July 31, 1984.

On March 23, 1993 and May 3, 1993, respectively, petitioner by its duly appointed representative, Milton Shaiman, Esq., and the Division of Taxation by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel) waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by July 30, 1993. The Division of Taxation submitted its documents on May 3, 1993. Petitioner submitted a two-page affirmation in reply outlining its position on June 10, 1993. The Division of Taxation submitted a responding letter brief on June 30, 1993. Thereafter, by a two-page letter dated July 27, 1993, together with additional attached documents, petitioner responded to the Division of Taxation's letter brief. In turn, the Division of Taxation submitted a three-page letter, dated July 30, 1993, in reply to petitioner's arguments. After due consideration of the evidence and arguments, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's denial of petitioner's claim for investment credit was proper.

FINDINGS OF FACT

Petitioner, 3M Carting, Inc., is a corporation organized and incorporated under the laws of the State of New York. Petitioner began doing business in New York State in August 1967.

For its fiscal years ended August 31, 1982 and July 31, 1984, petitioner filed a State of New York Corporation Franchise Tax Report (Form CT-3 for the FYE 8/31/82 and Form CT-4 for the FYE 7/31/84, respectively). On its Form CT-3, petitioner listed its principal business activity as "rubbish recycling". On its Form CT-4, petitioner listed its principal business activity as "rubbish removal".

As gleaned from investment credit schedules attached to each of the above-described reports, petitioner claimed investment credits in the respective amounts of $2,428.01 with respect to its fiscal year ended August 31, 1982, and $6,955.69 with respect to its fiscal year ended July 31, 1984. Information from these investment credit schedules, as well as from depreciation schedules included as part of petitioner's U.S. Corporation Income Tax Return (Form 1120) for each of the respective fiscal years, reveals that the claimed investment credit relates to the acquisition of two vehicles described respectively as a "20-yard packer vehicle" and a "15-yard packer vehicle". The schedules list respective acquisition dates of September 1981 and September 1983 for the vehicles, a useful life of seven years for each, a principal use listing of "recycle rubbish", and respective cost figures of $117,193.00 (for the 20-yard packer) and $82,084.00 (for the 15-yard packer). The depreciation schedules noted herein refer to these vehicles in each instance as "a truck".

Petitioner used the claimed investment credits as reductions against its franchise tax liability for each of the periods in question. However, the Division of Taxation ("Division") disallowed the claimed credits and issued notices to petitioner asserting tax and interest due for the fiscal year ended August 31, 1982, and tax, penalty and interest due for the fiscal year ended July 31, 1984. In turn, petitioner eventually paid the tax asserted as due for each of these years. More specifically, on August 17, 1987, petitioner paid in full the $3,755.00 amount (tax plus interest) asserted as due for the fiscal year ended August 31, 1982, and on May 18, 1989, petitioner paid in full the $9,482.72 amount (tax plus penalty and interest) asserted as due for

the fiscal year ended July 31, 1984.

On December 18, 1990, the Division received from petitioner a separate Claim for Credit or Refund of Corporation Tax Paid (Form CT-8) for each of the fiscal years at issue seeking refunds equal to the above amounts paid. The refund claims are each dated as signed on December 12, 1990, and bear an indate stamp indicating receipt by the Division on December 18, 1990. A photocopy of the envelope in which the refund claims were mailed bears a United States Postal Service postmark date of December 13, 1990. Each refund claim is premised upon the contention that the Division erroneously disallowed petitioner's claims for investment credit.

By a letter dated February 6, 1991, the Division denied each of petitioner's claims for refund.

Petitioner's position, as set forth in its affirmation in reply, is as follows:

> "The rubbish industry is controlled very strictly by the towns and the Department of Environmental Control. With the advent of the closing of landfill operations by the towns on Long Island, the nature of the collection of garbage changed to one of the beginning process of the manufacture of paper, wallboard, glass, aluminum sheets and steel.
>
> "3M Carting, Inc. was forced to buy this new equipment to accommodate the recycling program. The carter now picks up specialized loads, extracts from these materials, as is done in a mining operation, paper, cardboard, aluminum, steel, glass and other materials for recycling. The material is stored after it is sorted and packed by the machinery then shipped for further processing and manufacture."

In opposition to petitioner's position, the Division first argues that the refund claim for petitioner's fiscal year ended August 31, 1982 was not timely filed and must on that basis alone be denied. The Division goes on to argue, as to the merits, that petitioner has failed to establish that the machinery or equipment in question qualifies for the investment credit pursuant to Tax Law § 210.12(b) and 20 NYCRR 5-2.2. More specifically, the Division maintains that petitioner has not provided sufficient evidence that the equipment itself meets the criteria established for equipment on which an investment credit may be claimed, nor has petitioner established that the equipment in question was used so as to produce goods by processing, manufacturing, etc., as called for under the Tax Law.

As part of its July 27, 1993 submission, petitioner included a copy of a "Payment Document", dated August 10, 1985. This document was issued by the Division to petitioner seeking payment in an amount equal to the disallowed investment credit ($6,955.69) for the fiscal year ended July 31, 1984, plus penalty and interest. The lower portion of this document includes a section headed with the instruction "IF YOU DISAGREE WITH THE ABOVE ASSESSMENT, PLEASE CHECK APPROPRIATE BOX AND ENCLOSE DOCUMENTATION." None of the boxes appearing immediately below this heading are "checked", including the box labeled "refund requested", nor is there any indication of disagreement by petitioner appearing elsewhere on this document. In addition, petitioner submitted a photocopy of an unsigned handwritten statement, under the letterhead of the Chicago Title Insurance Company, providing as follows:

"

Sent
10/26/85

Dear Sirs,

We have protested this before. We have sent proof to you in regard to the money you say we owe. We have sent you letters prior to this one and the only response we get are assessment notices. Please check your files."

Finally, petitioner submitted a copy of its 1983 Form 1120 in support of its claim that the equipment in question qualified as property upon which investment credit is available.

In response to petitioner's submissions, the Division asserts that none of the above-described documents constitutes a claim for refund, and that petitioner's Federal return, on which a depreciation deduction is claimed, alone is not proof that the subject equipment qualifies for investment credit.

CONCLUSIONS OF LAW

A. Tax Law § 1087(a) provides that a claim for credit or refund of an overpayment of corporation franchise tax must be made within the later of either three years from the date the return was filed or two years from the date the tax was paid. With respect to the fiscal year ended August 31, 1982, the later of such two dates would be August 17, 1989, to wit, two years after the August 17, 1987 payment date (See Finding of Fact "4"). In turn, petitioner's claim for

refund with respect to the fiscal year ended August 31, 1982 was not dated until December 12, 1990 and was not received by the Division until December 18, 1990. Thus, it is clear that petitioner's refund claim for the fiscal year ended August 31, 1982 was not timely filed and, on such basis, must be denied. In this regard, the payment document and the handwritten note submitted by petitioner (see Finding of Fact "9") do not constitute refund claims. Both are dated prior to petitioner's payment of the amount in question, and since there could be no refund claim prior to payment, the question moots itself. Further, the handwritten note, on Chicago Title Insurance Company letterhead, is not in any apparent way related to the matter at issue. Most importantly, the payment document relates to the fiscal year ended July 31, 1984. The Division has not challenged the timeliness of petitioner's refund claim for such fiscal year. In sum, petitioner has not established that a timely refund claim was filed after payment of the amount due for the fiscal year ended August 31, 1982.

B. As noted above, there is no challenge raised as to the timeliness of petitioner's claim for refund for the fiscal year ended July 31, 1984. However, petitioner has failed to establish its entitlement to an investment credit for such fiscal year (or to such a credit for its fiscal year ended August 31, 1982, assuming arguendo no timeliness bar existed). More specifically, petitioner seeks the credit allowed by Tax Law § 210.12(b), which is available with respect to machinery and equipment principally used in the production of goods by manufacturing, processing, assembling, refining, mining, extracting or farming. Tax Law § 210.12(b) goes on to describe manufacturing to 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."

In order to qualify for the investment credit, the property upon which the credit is claimed must, among other things, be tangible personal property acquired by purchase (pursuant to Internal Revenue Code § 179[d]), be depreciable (pursuant to Internal Revenue Code § 167), have a useful life of four years or more, have a situs within New York State, and, as noted above, be principally used in the production of goods by one of the above-specified activities.

C. Based upon the scant evidence presented herein it seems that petitioner, as a part of its operations, purchased certain new equipment, (by its description consisting of a packer truck) to accommodate the recycling program(s) in effect in its area. It appears that petitioner picks up, as part of its refuse collection services, certain recyclable materials which petitioner in turn sorts, stores, and eventually ships on to others. On these facts, petitioner has neither alleged nor proven that any of its activities include the production of goods. The evidence does not support a conclusion that petitioner's use of the equipment upon which the credit is claimed involves making raw materials into new shapes, qualities or combinations of matter as described in Tax Law § 210.12(b). In fact, from the evidence it appears that petitioner essentially sorted various recyclable items into categories, which items were then turned over to others for subsequent processing, manufacturing, etc. The evidence does not establish that petitioner changed the sorted items into new or different products before shipping the same to other parties. In sum, it does not appear that petitioner's claimed "processing" brings about any significant change to the basic recyclable materials retrieved and sorted by petitioner, or that the same action in fact constituted the production of goods. Hence, the Division's denial of petitioner's claim for refund, as well as the Division's initial disallowance of the claimed credits, was proper and is sustained. Given the foregoing, it is unnecessary to address the Division's additional arguments as to the sufficiency of proof with regard to whether the equipment in question meets the qualifications outlined in Tax Law § 210.12(b) (i.e., having been acquired by purchase, having a useful life of four years or more, etc.).

D. The petition of 3M Carting, Inc. is hereby denied and the Division's denial of petitioner's claims for refund is sustained.

DATED: Troy, New York
September 23, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE