STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CONSTELLATION NUCLEAR POWER PLANTS LLC	:	DECISION DTA NO. 823553
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2001 through 2005.	:	

Petitioner, Constellation Nuclear Power Plants LLC, filed an exception to the determination of the Administrative Law Judge issued on April 11, 2013. Petitioner appeared by Hodgson Russ, LLP (Christopher L. Doyle, Paul R. Comeau, and Elizabeth Pascal, Esqs., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in Albany, New York, on December 18, 2013.

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

ISSUES

I. Whether petitioner has established that certain assets used in the operation of its nuclear power plants were principally used in the production of goods, and thereby established

entitlement to investment tax credits and employment incentive credits with respect to such assets.

II. Whether petitioner has established entitlement to investment tax credits for industrial waste treatment facilities and air pollution control facilities with respect to certain assets used in the operation of its nuclear power plants.

III. Whether petitioner has established that it was an industrial or manufacturing business as defined in Tax Law § 14-a (b), and thereby entitled to credit for energy taxes available to such businesses pursuant to Tax Law § 14-a (a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner and its Acquisition of Nuclear Power Plants in New York

1. During 2001 through 2005, Constellation Nuclear Power Plants, Inc., was a wholly-owned subsidiary of Constellation Energy Nuclear Group LLC, formerly doing business as Constellation Generation Group, which was wholly owned by Constellation Energy Group, Inc. (Constellation Energy). On October 16, 2009, Constellation Nuclear Power Plants, Inc. converted to Constellation Nuclear Powers Plants LLC under Delaware law. Constellation Nuclear Power Plants, Inc. and Constellation Nuclear Power Plants LLC are referred to herein as "petitioner."

2. On November 7, 2001, petitioner purchased from Niagara Mohawk 100% of the assets of Unit 1 and an 82% interest in the assets of Unit 2 of Nine Mile Nuclear Power Station in Scriba, New York (collectively Nine Mile). Following the acquisition, petitioner owned 100% of

the Unit 1 assets of Nine Mile and 82% of the Unit 2 assets of Nine Mile. Long Island Power Authority (LIPA) owned the remaining 18% of the Unit 2 assets of Nine Mile.

3. During 2001 through 2005, LIPA had the right to receive 18% of the electricity generated from the operation of Unit 2 and was responsible for paying 18% of Unit 2's operating costs.

4. On June 10, 2004, petitioner purchased all of the assets of R.E. Ginna Nuclear Power Station (Ginna) in Ontario, New York.

5. Petitioner sells all of the electricity generated at Nine Mile and Ginna to customers in the ordinary course of its business. Petitioner does not sell steam or water.

How Petitioner's New York Nuclear Power Plants Operate

Nine Mile

6. Nine Mile Units 1 and 2 are boiling water reactors. Unit 1 is a BWR-4 design with a Mark I containment system and supression pool. It began operation in 1970. Unit 1 generated approximately 4.65 billion kilowatt hours of electricity each year from 2002 through 2005. Unit 2, which came online in 1988, is a BWR-5 design with a Mark II containment system and supression pool. Unit 2 generated approximately 9.3 billion kilowatt hours of electricity each year from 2002 through 2005.

7. A boiling water reactor contains the reactor vessel, which is vertically mounted within a containment structure. The nuclear fuel assemblies are inside the vessel's core. Unit 1 at Nine Mile contains 532 fuel assemblies. Each fuel assembly contains 62 fuel rods and 129 cruciform-shaped boron carbide control rods. Unit 2 has 764 fuel assemblies, each with 62 fuel rods and 185 control rods. The fuel assemblies are installed vertically in the core of the reactor vessel. When the control rods are in place, nuclear fission is arrested. As the control rods are drawn out

from between the fuel rods, nuclear fission occurs, generating the heat needed to boil the feedwater creating steam.

8. Ultrapure feedwater is pumped into the reactor vessel through nozzles near the top of the vessel, well above the top of the nuclear fuel assemblies but below the water level. The feedwater is pumped downward inside the vessel but just outside the reactor core. The feedwater then reverses direction and moves upward through the nuclear core. The feedwater is circulated throughout the reactor core, picking up the heat created by nuclear fission as it passes through the fuel assemblies. As it absorbs heat, the feedwater is boiled creating steam. Since steam occupies a much larger volume than the water, the steam creates pressure. The pressure drives the steam-water mixture through the top of the reactor core and into two stages of moisture separation. The pressure then forces the dry steam into the steam line that carries the steam out of the containment structure and into the turbine building.

9. Once the steam has entered the turbine building through the steam line, it is directed to the main turbine, which is attached to the electrical generator. The pressurized steam turns the turbine, which turns the generator, thereby generating the electricity that petitioner sells to its customers. Steam exhaust from the main steam turbine then directly enters the condenser or indirectly enters the condenser after passing through a low pressure turbine. During a start-up or shutdown of one of the units, and during maintenance activities, a bypass line will isolate the turbines, allowing steam to flow directly to the condenser rather than to the turbines. During the 2001-2005, years this occurred, on average, about 112 hours per year (or about 1.4% of the time) at Nine Mile Unit 1 and about 43.5 hours per year (or about 0.5% of the time) at Nine Mile Unit 2. In these instances, water is heated to steam and steam is condensed back into water even though there is no electricity being generated.

10. The condenser is a heat exchanger, like a radiator on a car, except instead of air being used as the cooling medium, water is the cooling medium. Cool water is pumped through pipes and tubes in the condenser where it removes the heat from the steam and condenses the steam back into water. The warm cooling water exiting the condenser is then cooled, either in a cooling tower or some other cooling environment, before it is recirculated through the condenser. The cooling water never touches the steam or feedwater, i.e., it is always separated from the steam and feedwater by the metal tubes through which the water passes.

11. Once the steam passes through the condenser and is condensed into water, it is pumped through filters and demineralizers for purification and additional heat exchangers to remove excess heat. The purified water is pumped back to the boiling water reactor vessel via the feedwater pipes as the cycle repeats. The feedwater and steam are intended to stay within the reactor core, the turbine, and the condenser.

12. Nine Mile also contains multiple systems, known as the engineered safety features (ESF), designed to control reactor fission products and prevent or ameliorate the effects of possible malfunctions in the nuclear process. The ESF systems at Nine Mile include the following containment systems: the core spray system, the containment spray system and hydrogen recombiner. The ESF systems also include the emergency core cooling systems and the fission product removal and control systems.

Ginna

13. Ginna is a single unit plant with a Westinghouse Two Loop Pressurized Water Reactor. Commercial operations at Ginna first began in 1970. Ginna generated approximately four billion kilowatt hours of electricity each year from 2001 through 2005.

14. In a pressurized water reactor such as that located at the Ginna facility, the steam is created in steam generators, the heating source for which is not directly nuclear fission, but is instead pressurized water that is super-heated in the reactor vessel. So, with a pressurized water reactor, the steam and water circulating through the steam generator, the turbines, and the condenser never pass through the reactor vessel.

15. The containment structure at Ginna contains the reactor vessel, two steam generators, two reactor coolant pumps, a pressurizer, and the connecting piping. The cylindrical steel reactor vessel contains a core barrel with the nuclear fuel assemblies. Ginna has 121 fuel assemblies in its reactor core. Each fuel assembly includes 179 fuel rod locations, 16 guide tubes, and one instrument thimble. Normal refueling operations are conducted approximately every 18 months, during which one-third of the fuel assemblies are removed from the core and placed in the spent fuel pool.

16. The coolant water is pressurized and cycled to the reactor vessel by coolant pumps. The coolant water enters the reactor vessel at an inlet nozzle. The shape of the core barrel forces the water to flow downward in the space between the reactor vessel wall and the core barrel to the bottom of the reactor vessel. The coolant water is then directed upward to pass through the fuel assemblies, transferring the nuclear fission-produced heat to the coolant water. The coolant water is kept at a high pressure of 2,235 pounds per square inch, which prohibits the coolant water from becoming steam and allows the coolant water to reach temperatures above those that could be attained at normal pressure. At normal pressure, water will boil and turn to steam at 212 degrees Fahrenheit. Under increased pressure, water in its liquid state can reach temperatures far in excess of 212 degrees, and the pressurized coolant water can reach

temperatures in excess of 600 degrees. The super-heated reactor coolant water is directed to the top of the fuel assemblies and out of the reactor vessel through an outlet nozzle.

17. The super-heated coolant water then flows from the reactor to the steam generator. The steam generator is a heat exchanger in which feedwater becomes steam by the absorption of heat from the super-heated coolant water. This is done by passing the super-heated coolant water through metal tubes in the steam generator. Once it has given off much of its heat, the reactor coolant water leaves the discharge side of the steam generator, goes through coolant pumps and reenters the inlet side of the reactor vessel to repeat the cycle.

18. The feedwater flows around the outside of the steam generator tubes where it picks up heat from the super-heated reactor coolant water. When the feedwater absorbs sufficient heat, it becomes steam. Since steam occupies a much larger volume than the feedwater, pressure is created, which forces the water/steam mixture to the top of the steam generator vessel through moisture separators. The pressure also forces the steam to exit the steam generator and continue on to the turbine building.

19. After the steam exits the steam generator, it is piped to the turbine building. Once the steam has entered the turbine building through the steam line, it is directed to the main turbine, which is attached to the electrical generator. The steam pressure turns the turbine, which turns the generator, thereby generating the electricity that petitioner sells to its customers. Steam exhaust from the main steam turbine then directly enters the condenser or indirectly enters the condenser after passing through a low pressure turbine. During a start-up or shutdown of the unit, and during certain maintenance activities, a bypass line will isolate the turbines, allowing steam to flow directly to the condenser rather than to the turbines. During the 2001-2005 years, this occurred, on average, about 105 hours per year (or about 1% of the time) at Ginna. In these

instances, water is heated to steam and steam is condensed back into water even though there is no electricity being generated.

20. Cooled water is circulated through tubes in the condenser where it removes heat from the steam. Then the water used to cool the steam exits the condenser and is circulated through a cooling environment.

21. In the condenser, the steam passes over the tubes containing the cooled water and loses heat, causing the steam to condense into feedwater for the next cycle. Once the water collects inside the main condenser, the water passes through a purification system. The purified water continues through low pressure feedwater heaters to increase its temperature. The feedwater then enters the suction of the main feedwater pumps and passes through a set of high pressure feedwater heaters using extraction steam from the turbines. The heated and pressurized feedwater now reenters the steam generators to begin the cycle again. The feedwater and steam are intended to stay within the steam generator, the turbine, the condenser, and the pipes and pumps interconnecting that equipment.

22. Like Nine Mile, Ginna contains multiple ESF systems designed to control reactor fission products and prevent or ameliorate the effects of possible malfunctions in the nuclear process. The ESF systems at Ginna include the following containment systems: the containment circulation fan cooler, containment post-accident charcoal systems, containment isolation valves, containment spray system and hydrogen recombiners. The ESF systems also include the emergency core cooling system and the safety injection systems and accumulators to maintain barriers to prevent the release of nuclear materials into the environment.

Safety, Pollution Control, and Environmental Regulation of Petitioner's New York Plants

23. The nuclear power facilities at Nine Mile and Ginna are licensed and regulated by the Nuclear Regulatory Commission (NRC).

24. Nine Mile Units 1 and 2 were issued their initial operating licenses on December 26, 1974 and July 2, 1987, respectively. These licenses were renewed on October 31, 2006. As part of the license renewal process, the NRC issued a Final Safety Evaluation Report.[1]

25. Ginna was issued its initial Operating License on September 19, 1969, which was renewed on May 19, 2004. As part of the license renewal process, the NRC issued a Final Safety Evaluation Report.

26. As part of the licensing process for each plant, the NRC issued a Generic Environmental Impact Statement (the GEIS) for License Renewal of Nuclear Plants (NUREG-1437). In February 2004, it published Supplement 14, Regarding R.E. Ginna Nuclear Power Plant. In May 2006, it published Supplement 24, Regarding Nine Mile Point Nuclear Station, Units 1 and 2 - Final Report.[2]

27. The GEIS discusses and evaluates the nuclear plant's interactions with the environment and the impact of the plant's operations on the environment both under normal operating conditions and in the event of an accident.

28. Nine Mile Point and Ginna use liquid, gaseous, and solid radioactive waste management systems to collect and process radioactive wastes so that the release of any wastes

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[1] Pursuant to State Administrative Procedure Act (SAPA) § 306 (4), official notice is taken of the Final Safety Evaluation Report for Nine Mile Units 1 and 2, as well as the Final Safety Evaluation Report for Ginna, both of which are available on the NRC's website.

[2] Official notice is taken of the GEIS and Supplements 14 and 24, which are available at the NRC's website (SAPA § 306 [4]).

remain within regulatory limits and radioactive levels are maintained as low as reasonably achievable (ALARA) before they are released to the environment.

29. The waste disposal systems meet the design objectives and release limits as set forth in Title 10 of the Code of Federal Regulations (CFR) Part 20 and 10 CFR Part 50, Appendix I, "Numerical Guides for Design Objectives and Limiting Conditions for Operation to Meet the Criterion 'As Low As is Reasonably Achievable' for Radioactive Material in Light-Water-Cooled Nuclear Power Effluents."

30. Before being released into Lake Ontario, any liquid waste must meet the requirements established by New York State for liquid discharges.

Nine Mile Environmental Protection

31. On September 6, 2005, petitioner applied to the Division of Air Resources of the New York State Department of Environmental Conservation (DEC) for tax certification for 18 systems at Nine Mile as air pollution control facilities. The applications included an explanation of the function of each such system and petitioner's opinion as to how each qualified as an air pollution control facility under the Tax Law and Environmental Conservation Law (ECL).

32. Petitioner requested such tax certification with respect to the following equipment and systems installed at Nine Mile Units 1 and 2: Unit 1 and Unit 2 reactor buildings; Unit 1 and Unit 2 ECCS - emergency core spray system; Unit 1 emergency core cooling system (ECCS) - auxiliary heat removal emergency cooling system; Unit 2 nuclear reactor building North and South auxiliary structure; Unit 1 and Unit 2 emergency diesel generator systems and structures; Unit 1, Unit 2, and common radiation monitoring systems; Unit 2 gaseous radioactive waste storage and disposal system; and Unit 2 nuclear reactor biological shield wall - primary containment. Petitioner claimed an investment tax credit (ITC) and employment incentive credit

(EIC) for such equipment and systems based on its belief that the assets were used for air pollution control.

33. The Unit 1 and Unit 2 reactor buildings house the refueling and reactor servicing equipment, new and spent fuel storage facilities, and other reactor auxiliary or service equipment. The major function of these containment structures is to minimize ground-level release of airborne radioactive materials by providing controlled, elevated release of the building atmosphere through a filter system under accident conditions. The reactor building is an outer concrete building that is strong enough to survive such things as crashing jet airliners and the containment structures are necessary to prevent the escape of radiation or radioactive steam in the event of an accident, like the one at Three Mile Island.

34. The Unit 1 and Unit 2 emergency core spray systems are part of the ECCS and are designed to maintain the integrity of the nuclear fuel cladding in order to prevent the release of radionuclides to the environment. The core spray system consists of two redundant and independent core spray systems that cool the core in the event of a loss-of-coolant accident. In addition, the core spray systems perform functions that support fire protection and environmental qualification.

35. The Unit 1 auxiliary heat removal emergency cooling system is also part of the ECCS. It provides for decay heat removal from the reactor fuel in the event that reactor feedwater capability is lost and the main condenser is not available. The removal of the decay heat in this emergency situation ensures the integrity of the fuel cladding and prevents the release of radionuclides to the environment. The emergency cooling system is connected to the reactor and operates by natural circulation. During operation of the emergency cooling loops, steam rises from the reactor vessel to the condenser tubes where it is condensed by boiling the

condenser shell water. As the water condenses, it returns by gravity flow to the suction of a reactor recirculating pump and thus to the reactor vessel.

36. The North and South auxiliary structures of the Unit 2 reactor building house the ECCS systems and are integral to the removal of heat from the reactor core to preserve fuel cladding integrity and prevent the release of radionuclides to the environment.

37. The Unit 1 and Unit 2 emergency diesel generator systems and structures provide the standby source of electric power for equipment required during an accident, for safe shutdown, and for maintenance of Nine Mile. The system consists of two independent standby diesel generators and associated subsystems. The structures housing the diesel generator systems are designed to withstand various accident and event scenarios.

38. The radiation monitoring systems (Unit 1, Unit 2, and common systems) measure the level of radioactivity in potentially radioactive effluents and process streams. This allows demonstration of compliance with release levels during normal plant operations by providing gross radiation level monitoring and off-line isotopic analysis of gaseous effluents including halogens and particulates. The systems also initiate valve isolation on the offgas system, containment purge, and liquid waste system if predetermined release rates are exceeded. The initiation of valve isolation reduces the amount of radioactive materials released into the environment.

39. The Unit 2 gaseous waste management systems include the offgas (OFG) system, standby gas treatment system (SGTS), and various building ventilation systems. The offgas system removes noncondensable radioactive gases that accumulate in the main condenser during plant startup and normal operation. The purpose of the SGTS is to limit the release of radioactive gases from the reactor building to the environment within the guidelines of 10 CFR

100 in the event of a loss-of-coolant accident and to maintain negative pressure in the reactor building under accident conditions.

40. The Unit 2 biological shield wall, located around the exterior of the drywell, reduces radiation heating in the drywell concrete wall; reduces activation of, and radiation effects on, materials and equipment in the drywell; and provides limited access to the annular region for periodic shutdown inspection and maintenance.

41. On September 21, 2005, petitioner received a letter from the Division of Air Resources of DEC rejecting petitioner's application for tax certification for the air pollution control facilities at Nine Mile, and stating, in relevant part:

> According to our records, this facility [Nine Mile] does not have any air permits or Certificates to Operate for any air emission sources at the plant. In addition, this office does not regulate any of the equipment identified in your applications since they are not air pollution control devices regulated by any of DEC's air pollution control regulations. Furthermore, our office does not regulate radiation emissions. Given the above, the Department [DEC] is unable to certify compliance for equipment that we have no regulatory requirements for, and for which air permits are not required.

42. On September 6, 2005, petitioner applied to the Division of Water Resources of DEC for tax certification of 10 systems at Nine Mile as industrial waste treatment facilities. The applications included an explanation of the function of each such system and petitioner's argument as to how each qualified as an industrial waste treatment facility under the Tax Law and the ECL.

43. Petitioner requested such tax certification with respect to the following equipment and systems installed at Nine Mile Units 1 and 2: Unit 1 and Unit 2 liquid radioactive waste storage and disposal systems; Unit 1 and Unit 2 solid radioactive waste storage and disposal systems; sanitary sewage treatment system and structure; Unit 1 and Unit 2 nuclear radwaste

buildings; storm water collection and segregation system; and the Unit 2 cooling tower system. Petitioner claimed an ITC and EIC for such equipment and systems based on its belief that the assets were used in the treatment of industrial waste.

44. The Unit 1 and Unit 2 liquid radioactive waste storage and disposal systems (LWS) collect, control, treat, neutralize, store, and remove liquid radioactive waste generated from normal operation and anticipated operational occurrences. The LWS is designed to handle four types of liquid waste: high-conductivity waste; low-conductivity waste; chemical waste; and miscellaneous waste. Discharges to the environment are kept to a practical minimum by the treatment and recycling of much of the waste within the plant, by filtration of much of the waste before discharge, and by the concentration of radiological waste and conversion of the resulting concentrate into solid waste.

45. The Unit 1 and Unit 2 solid waste systems (SWS) hold, monitor, treat, package, and provide temporary storage facilities for radioactive materials prior to shipment offsite and ultimate disposal. The system provides for the dewatering/solidification and packaging of wet solid waste into shipping containers prior to shipment for offsite disposal. The SWS is designed to handle spent resins, filter sludge, and concentrated waste, as well as to provide for collection and shipment of low-level solids.

46. The Unit 1 and Unit 2 radwaste buildings house the radioactive waste storage and disposal systems.

47. Pursuant to the Clean Water Act and authority granted by the U.S. Environmental Protection Agency, New York State granted a State Pollutant Discharge Elimination System (SPDES) Permit for certain wastewater treatment property at Nine Mile. Under its SPDES permit, Nine Mile is permitted to treat and discharge sanitary sewage.

48. As per SPDES Permit No. NY-000-1015, the sanitary sewage and treatment system is permitted to treat 0.0120 millions of gallons per day of sanitary sewage. Treated effluent undergoes chlorination and subsequent dechlorination before being discharged via a 12-inch pipe to a drainage ditch eventually flowing to Lake Ontario. The discharge is permitted as Outfall 030.

49. The storm water collection and segregation system segregates storm water from process wastewater and directs the flow of storm water runoff for discharge from the site. Drainage from the site flows to catch basins and drains that conduct water by way of underground drain pipes and surface drainage ditches to the storm water detention pond on the site. Oil spillage that reaches the detention pond is controlled by placement of a surface boom to restrict discharge of oil from the detention pond, then removed for disposal as necessary.

50. The Unit 2 cooling tower system and circulating water system utilizes a closed-loop circulating water system and a natural draft cooling tower for dissipating heat from the main turbine condenser. The current SPDES Permit No. NY-000-1015 allows a maximum daily discharge temperature of 110°F from Unit 2 and a maximum allowable intake-discharge temperature difference of 30°F.

51. There is no evidence in the record of any response from DEC Division of Water Resources to petitioner's application for tax certification for industrial waste treatment facilities at Nine Mile.

Ginna Environmental Protection

52. On December 19, 2005, petitioner applied to the Division of Air Resources of DEC for tax certification for nine systems at Ginna as air pollution control facilities. The applications

included descriptions of each system and petitioner's argument as to how each qualified as an air pollution control facility under the Tax Law and the ECL.

53. Petitioner requested such tax certification with respect to the following equipment and systems installed at Ginna: containment building; reactor vessel; emergency core cooling system (ECCS) - containment spray system; ECCS - safety injection system; radiation monitoring system; and emergency power equipment. Petitioner claimed an ITC and EIC for such equipment and systems based on its belief that the assets were used for air pollution control.

54. The reactor containment building is an outer concrete building that is strong enough to survive such things as crashing jet airliners. The structure houses and supports safety-related equipment, provides radiation shielding, and provides a barrier against the release of radioactive nuclides. The structure is necessary to prevent the escape of radiation or radioactive steam in the event of an accident, like the one at Three Mile Island.

55. The reactor vessel is part of the primary system (also called the reactor coolant system) consisting of the reactor vessel, the steam generators, the reactor coolant pumps, a pressurizer, and the connecting piping. The reactor vessel is one of the barriers to the release of radionuclides to the environment. It also provides support of the internal reactor functions and structural support.

56. The containment spray system is one of the ECCS systems designed to maintain the integrity of the nuclear fuel cladding in order to prevent the release of radionuclides to the environment. Appendix A to the Code of Federal Regulations Part 50 mandates the installation of a system to remove heat from the reactor containment in the case of an accident to maintain acceptably low levels of containment pressure. The containment spray system also contains

components that are part of the Environmental Qualification Program, which is part of the licensing process.

57. The safety injection system is another ECCS system designed to provide cooling in the event of a loss-of-coolant accident caused by ruptures in primary system piping. The ECCS is designed to provide short and long term cooling requirements for the removal of heat from the reactor core to preserve fuel cladding integrity and prevent the release of radionuclides to the environment. The safety injection system is also credited for use in safe shutdown following some fires and contains components that are part of the Environmental Qualification Program.

58. The radiation monitoring system monitors radiation levels of designated systems and areas of the plant, including plant gaseous effluent, during all modes of plant operation, including post-accident monitoring. This system also has a control function that automatically stops or reduces the effluent flow in the event of high levels of radioactive nuclides in the gaseous stream.

59. The emergency diesel generator system provides a reliable, redundant electric power source for safety-related components when the preferred power supply is not available. The system maintains the integrity of the fuel rod cladding within the reactor, in the event of an accident, which ultimately prevents the release of radionuclides to the environment.

60. Petitioner received a letter dated January 4, 2006, from the Division of Air Resources of DEC denying petitioner's application for tax certification. The letter explained the basis of the denial, in relevant part, as follows:

> "Unfortunately, I am not able to provide you with the certificates you asked for. Historically, tax certificates have only been provided where actual air pollution control equipment is utilized. Since none of these nine systems fall into this category, I cannot approve them."

61. On December 19, 2005, petitioner applied to the Division of Water Resources of DEC for tax certification of eight systems at Ginna as industrial waste treatment facilities. The applications included descriptions of each system and petitioner's argument as to how each qualified as an industrial waste treatment facility under the Tax Law and the ECL.

62. Petitioner requested such tax certification with respect to the following equipment and systems installed at Ginna: wastewater collection and treatment system; liquid radioactive waste storage and disposal; radioactive solid waste storage and disposal system; sanitary sewage treatment system and structure; oil spill collection systems - secondary containment; nuclear radwaste building; storm water collection and segregation system; and the steam generator blowdown system. Petitioner claimed an ITC and EIC for such equipment and systems based on its belief that the assets were used in the treatment of industrial waste.

63. Radioactive liquid wastes are treated in the wastewater collection and treatment system and the liquid radioactive waste storage and disposal system. Radioactive fluids entering the waste disposal system are collected in sumps and tanks until a determination regarding subsequent treatment can be made. The waste is then processed and released under controlled conditions to preclude releases in excess of the limits of 10 CFR Part 20 and to maintain radioactive discharges to ALARA levels according to the requirements of 10 CFR Part 50, Appendix I.

64. The radioactive solid waste storage and disposal system is designed to package solid waste in standard liners and other approved packages for removal to burial or processing facilities. In addition to dry active waste, solid waste produced at Ginna includes sludge, oily waste, bead resin, and filters.

65. The sanitary sewage treatment system and structure collects and discharges wastewater into the treatment system operated by the Town of Ontario for the treatment, neutralization or stabilization of industrial waste and other wastes generated through normal process operations at Ginna. New York State granted a SPDES permit (No. NY-000-0493) for certain wastewater treatment property at Ginna. Under its SPDES permit, Ginna is permitted to treat and discharge sanitary sewage.

66. The oil spill collection systems (secondary containment) contain any oil or other spills for inspection and treatment prior to release as required by the Code of Federal Regulations, Containment/Diversionary Structures (40 CFR 112.7[c]). The entire containment system, including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank or pipe, will not escape the containment system before cleanup occurs.

67. The nuclear radwaste building houses the radwaste systems that are used to treat and store the radioactive materials created in the steam generation process.

68. The storm water collection and segregation system separates storm water from process wastewater and directs the flow of storm water runoff for discharge from the site. Drainage from the site flows to catch basins and drains that conduct water by way of underground drain pipes and surface drainage ditches to the storm water detention pond on the site. Any oil spillage that reaches the detention pond is separated and removed for disposal as necessary.

69. The steam generator blowdown system helps to control the chemistry in the steam generator. The steam generator blowdown system extracts wastewater from both the hot leg and

the cold leg of the steam generators and routes the wastewater to the secondary chemical control system for wastewater processing.

70. Petitioner received a letter dated January 18, 2006 from the Division of Water Resources of DEC that rejected petitioner's application for tax certification, stating:

> "We received your applications for eight systems at [Ginna]. Unfortunately, I am not able to provide you with all the certificates you asked for. Article 17-0705 and 17-0707 [of the Environmental Conservation Law (ECL)] only refer to industrial waste treatment facilities constructed in order to comply with ECL and authorized by SPDES permit. NRC regulates 10 CFR Part 20 and 10 CFR Part 50 Appendix I facilities.
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> Item 2 Wastewater Collection and Treatment appears in part to be Outfall 001B. Item 3 Sanitary Sewage is covered as pretreatment. Item 4 is in part Outfall 001C. Item 5 Stormwater Detention Pond is Outfall 005, but is not followed by an oil water separator. Item 8 Steam Generator Blowdown is Outfall 001B. 6 NYCRR 655 excludes collection systems including pumping and transmitting facilities preceding the point of treatment, neutralization, or stabilization. Tax Certification is for the amount of increased property value.
>
> Tax certificates will be considered for resubmitted applications for Outfall 001B, sanitary sewage and Outfall 001C."

71. Petitioner did not submit any further applications to DEC for certification.

Petitioner Files Its Claims for Credits

72. On September 12, 2005, petitioner timely filed Form CT-8, Claim for Credit or Refund of Corporation Tax Paid, for the tax period ended December 31, 2001, requesting a refund of corporation franchise tax in the amount of $22,534,495.00. The reason for the claim was stated as "Taxpayer was eligible for the refundable Investment Tax Credit."

73. On September 11, 2006, petitioner timely filed Form CT-8, Claim for Credit or Refund of Corporation Tax Paid, for the tax period ended December 31, 2002, requesting a refund of corporation franchise tax in the amount of $3,379,880.00. The reason for the claim was stated as "Taxpayer was eligible for the refundable Investment Tax Credit, the Employment

Incentive Credit and the Industrial or Manufacturing Business Credit" (the industrial or manufacturing business credit shall be referred to as "IMBC").

74. On September 11, 2006, petitioner also timely filed Form CT-8, Claim for Credit or Refund of Corporation Tax Paid, for the tax period ended December 31, 2003, requesting a refund of corporation franchise tax in the amount of $4,027,845.00. The reason for the claim was stated as "Taxpayer was eligible for the refundable Investment Tax Credit, the Employment Incentive Credit and the Industrial or Manufacturing Business Credit."

75. On September 11, 2006, petitioner also timely filed Form CT-8, Claim for Credit or Refund of Corporation Tax Paid, for the tax period ended December 31, 2004, requesting a refund of corporation franchise tax in the amount of $18,347,236.00. The reason for the claim was stated as "Taxpayer was eligible for the refundable Investment Tax Credit, the Employment Incentive Credit and the Industrial or Manufacturing Business Credit."

76. On September 2, 2009, petitioner timely filed an amended Form CT-3, General Business Corporation Franchise Tax Return, for the tax period ended December 31, 2005, in which petitioner claimed a refund of corporation franchise tax in the amount of $3,317,730.00.

77. Petitioner claimed ITC and EIC for the following equipment at Unit 1 and Unit 2 of Nine Mile based on its belief that the assets were principally used in the production of goods by manufacturing or processing:

(1) the containment structure and all of the equipment within that structure (including safety features) used to circulate the feedwater through the reactor vessel, boil the water into steam and then to direct the steam out of the containment structure to the turbine building;

(2) the steam lines connecting the turbines to the condenser;

(3) the equipment, including the condenser and heat exchangers, used to condense the steam into feedwater and return the feedwater back to the reactor vessel; and,

(4) nuclear fuel and fuel assemblies.

These assets, with the exception of certain equipment determined not to be potentially eligible for credits by agreement between petitioner and the Division of Taxation (Division) and therefore no longer included in the claims at issue, were used to create steam from water or water from steam. The steam thus created was generally used to turn turbines attached to a generator, thereby generating electricity to be sold. No credits were claimed for the equipment in the turbine building, the electrical generator, or the equipment connecting the turbines to the generator.

78. All of the assets that comprise the manufacturing portions of petitioner's claims for ITC, EIC, and IMBC at Nine Mile are necessary for the operation of a nuclear power plant that sells only electricity.

79. As stated in Finding of Fact 43, petitioner claimed an ITC and EIC for certain equipment and systems installed at Nine Mile Units 1 and 2 based on its belief that the assets were used in the treatment of industrial waste.

80. As stated in Finding of Fact 32, petitioner claimed an ITC and EIC for certain equipment and systems installed at Nine Mile Units 1 and 2 based on its belief that the assets were used for air pollution control.

81. Petitioner claimed an ITC and EIC for the following equipment at Ginna based on its belief that the assets were principally used in the production of goods by manufacturing or processing:

(1) the containment structure and all of the equipment within that structure (including safety features) used to pressurize and heat the coolant water, pump the coolant water

through the steam generator and then to direct the steam out of the containment structure to the turbine building;

(2) the steam lines connecting the turbines to the condenser; and,

(3) the equipment, including the condenser and heat exchangers, used to condense the steam into feedwater and return the feedwater back to the reactor vessel.

These assets, with the exception of certain equipment determined not to be potentially eligible for credits by agreement between petitioner and the Division, and therefore no longer included in the claims at issue, were used to create steam from water or water from steam. The steam thus created was generally used to turn turbines attached to a generator, thereby generating electricity to be sold. No credits were claimed for the equipment in the turbine building, the electrical generator, or the equipment connecting the turbines to the generator.

82. All of the assets that comprise the manufacturing portions of petitioner's claims for ITC, EIC and IMBC at Ginna are necessary for the operation of a nuclear power plant that sells only electricity.

83. As stated in Finding of Fact 62, petitioner claimed an ITC and EIC for certain equipment and systems installed at Ginna based on its belief that the assets were used in the treatment of industrial waste.

84. As stated in Finding of Fact 53, petitioner claimed an ITC and EIC for certain equipment and systems installed at Ginna based on its belief that the assets were used for air pollution control.

The Division Denies the Claims; an Administrative Challenge Ensues

85. The claims for refund for the periods ended December 31, 2001 through 2004 were denied by the Division by letter dated March 8, 2007.

86. Following a timely-filed Request for Conciliation Conference and the resulting conference, the Bureau of Conciliation and Mediation Services issued an Order dated December 18, 2009 sustaining the Division's denial of the credits.

87. On or before March 18, 2010, petitioner timely filed its petition in this matter with the Division of Tax Appeals.

The Parties Agree on the Numbers if the Credits are Ultimately Allowed

88. If it is determined that petitioner's assets do not qualify for the ITC pursuant to Tax Law § 210 (12) (b) (i) (A) or (B), the portions of the refunds and carryforwards attributable to ITC and EIC should be denied in full.

89. If it is determined that petitioner is not engaged in an industrial or manufacturing business pursuant to Tax Law § 14-a, the portion of the refunds attributable to IMBC should be denied in full.

90. If, as petitioner asserts, ITC and EIC are permitted under the respective statutory provisions, there would be a recapture of a portion of the credits as a consequence of a sale of certain of petitioner's ownership interests. Specifically, the parties agree that a total of 39.63% of the credits allowed on 5-year and 15-year property would be subject to ratable recapture pursuant to Tax Law § 210 (12) (g) as a result of the sale of a 39.63% interest in petitioner in October 2009.

91. The tables and other information in Findings of Fact 92 through 97 reflect the credits and carryovers that would be permitted under the various scenarios indicated.

92. If it is determined that the only qualifying assets herein are those petitioner asserts as ITC and EIC-eligible on the basis that such assets are principally used in the production of goods by manufacturing or processing pursuant to Tax Law § 210 (12) (b) (i) (A) and (ii) (A), then a

refund of $41,085,297.00 is due, plus statutory interest, and EIC carryforward of $17,093,264.00 is due, computed in accordance with the following Table MFG:

MFG	2001	2002	2003	2004	2005	Total
ITC earned after recapture	17,509,389	2,767,385	1,584,452	12,880,007	3,104,730	
EIC earned after recapture	0	8,996,507	10,166,300	1,169,792	0	
ITC used	55,872	0	0	0	0	
EIC used	0	334,970	1,432,802	331,781	1,139,781	
Tax due after credits	1,500	167,485	915,239	283,803	550,064	
Tax previously paid	57,372	502,455	2,348,041	615,584	1,689,845	
Overpayment (Interest bearing)	55,872	334,970	1,432,802	331,781	1,139,781	3,295,206
ITC that is refundable	17,453,517	2,767,385	1,584,452	12,880,007	3,104,730	37,790,091
Net refund	17,509,389	3,102,355	3,017,254	13,211,788	4,244,511	41,085,297
EIC Carry-forward to next period	0	8,661,536	17,395,034	18,233,045	17,093,264	17,093,264

93. If it is determined that the only qualifying assets herein are those petitioner asserts as ITC and EIC-eligible on the basis that such assets are industrial waste treatment facilities and air pollution control facilities (together, pollution control or "PC") used in petitioner's trade or business, pursuant to Tax Law § 210 (12) (b) (i) (B), (ii) (C), and (ii) (D), then a refund of $11,169,881.00 is due, plus statutory interest, and EIC carryforward of $3,282,412.00 is due, computed in accordance with the following Table PC:

PC	2001	2002	2003	2004	2005	Total
ITC earned after recapture	6,401,703	0	0	1,528,843	0	
EIC earned after recapture	0	3,260,873	3,260,873	0	0	
ITC used	55,872	0	0	0	0	
EIC used	0	334,970	1,432,802	331,781	1,139,781	
Tax due after credits	1,500	167,485	915,239	283,803	550,064	
Tax previously paid	57,372	502,455	2,348,041	615,584	1,689,845	
Overpayment (Interest bearing)	55,872	334,970	1,432,802	331,781	1,139,781	3,295,206
ITC that is refundable	6,345,832	0	0	1,528,843	0	7,874,675
Net refund	6,401,704	334,970	1,432,802	1,860,624	1,139,781	11,169,881
EIC Carryforward to next period	0	2,925,903	4,753,974	4,422,193	3,282,412	3,282,412

94. If it is determined that the only qualifying assets herein are those petitioner asserts as ITC and EIC-eligible on the basis that such assets are industrial waste treatment facilities used in petitioner's trade or business, pursuant to Tax Law § 210 (12) (b) (i) (B) and (ii) (C), then 26% of the total PC ITC and EIC is due, constituting a refund of $3,757,596.00, plus statutory interest.

95. If it is determined that the only qualifying assets herein are those petitioner asserts as ITC and EIC-eligible on the basis that such assets are air pollution control facilities used in petitioner's trade or business, pursuant to Tax Law § 210 (12) (b) (i) (B) and (ii) (D), then a refund of 74% of the total PC ITC and EIC is due, constituting a net refund of $9,107,938.00, plus statutory interest, and EIC carryforward of $1,586,758.00.

96. If it is determined that the assets asserted to qualify for the ITC and the EIC herein on the basis that such assets are principally used in the production of goods by manufacturing or processing pursuant to Tax Law § 210 (12) (b) (i) (A) and (ii) (A) do so qualify, and if it is determined that the assets asserted to qualify for the ITC and the EIC on the basis that such assets are industrial waste treatment facilities[3] used in petitioner's trade or business pursuant to Tax Law § 210(12)(b)(i)(B) also qualify, then a refund of $41,163,727 is due, plus statutory interest, and EIC carryforward of $17,133,284 is due, computed in accordance with the following Table MFG/PC:

MFG/PC	2001	2002	2003	2004	2005	Total
ITC earned after recapture	17,509,389	2,767,385	1,584,452	12,958,437	3,104,730	
EIC earned after recapture	0	8,996,507	10,166,300	1,169,792	0	
ITC used	55,872	0	0	0	0	
EIC used	0	334,970	1,432,802	331,781	1,139,781	
Tax due after credits	1,500	167,485	915,239	283,803	550,064	
Tax previously paid	57,372	502,455	2,348,041	615,584	1,689,845	
Overpayment (Interest bearing)	55,872	334,970	1,432,802	331,781	1,139,781	3,295,206
ITC that is refundable	17,453,517	2,767,385	1,584,452	12,958,437	3,104,730	37,868,521

[3] All equipment claimed as eligible for the ITC and EIC on the basis that such assets are air pollution control facilities was also claimed as eligible for the credits on the basis that such assets were principally used in the production of goods by manufacturing or processing. Only certain equipment at Ginna for the 2004 tax year was claimed as eligible for credits solely on the basis that such assets were industrial waste treatment facilities. This is why the credits shown as available on Table MFG/PC do not reflect any air pollution control facilities, and the sum of the credits shown as available on Table MFG and Table PC is greater than the credits shown as available on Table MFG/PC.

Net refund	17,509,389	3,102,355	3,017,254	13,290,218	4,244,511	41,163,727
EIC Carryforward to next period	0	8,661,536	17,395,034	18,273,065	17,133,284	17,133,284

97. If it is determined that petitioner is engaged in an industrial or manufacturing business pursuant to Tax Law § 14-a, a refund of $70,950.00 is due, computed in accordance with the following Table IMBC:

IMBC	2001	2002	2003	2004	2005	Total
Credit Earned	0	32,748	21,806	16,396	0	70,950
Refundable IMBC that is allowed	0	32,748	21,806	16,396	0	70,950

98. The Division does not dispute that petitioner was a "new business" as that term is used in Tax Law § 210 (12) (j).

99. The assets, the cost or federal income tax basis of which form the credit base of the ITC and the EIC, were:

(a) property subject to depreciation under Internal Revenue Code § 167;

(b) depreciable over a period of four years or more;

(c) acquired by "purchase" as that term is defined in Internal Revenue Code § 179 (d); and,

(d) had a situs in New York at all times relevant to this case.

100. Petitioner maintained the increased employment levels required for it to receive the full amount of the EIC.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that tax credits are a particularized form of exemption from taxation. He also noted that statutes authorizing such exemptions should be

strictly construed against the taxpayer, and that the taxpayer bears the burden of establishing clear entitlement to the sought-after credit.

Turning to the manufacturing ITC, the Administrative Law Judge noted that petitioner would not be eligible for this tax credit if the claimed assets were principally involved in producing electricity. The Administrative Law Judge determined that the individual assets must be viewed as a whole because the Ginna and Nine Mile nuclear power plants operated as integrated systems. The Administrative Law Judge concluded that the unitary operation made it impossible either to segregate the systems, or to disregard the facilities' primary purpose: producing electricity. As such, the Administrative Law Judge held that the components at both plants were engaged in manufacturing an item that is not considered a good for purposes of the manufacturing ITC. Accordingly, the Administrative Law Judge sustained the denial of petitioner's refund claim based on the manufacturing ITC.

The Administrative Law Judge next addressed petitioner's refund claim based on the pollution control ITC. Petitioner claimed that a combined total of 18 assets met the definition of an industrial waste treatment facility, and that 27 assets constituted air pollution facilities. In reviewing the relevant statutes, the Administrative Law Judge noted that the ITC required facilities to be certified by DEC for compliance with the laws of New York State. As none of these of assets received certification, the Administrative Law Judge determined that petitioner could not use them to claim the pollution control ITC. The Administrative Law Judge did not address petitioner's constitutional argument because it was a facial challenge. Accordingly, the Administrative Law Judge found that petitioner was not entitled to the pollution control ITC.

The Administrative Law Judge also concluded that petitioner failed to prove entitlement to the EIC because it was not eligible for either the manufacturing or pollution control ITC under

Tax Law § 210.12. Additionally, the Administrative Law Judge rejected petitioner's claims that it was entitled to the IMBC on the same grounds as the manufacturing ITC. Accordingly, the Administrative Law Judge sustained the denial of petitioner's refund request.

ARGUMENTS ON EXCEPTION

Petitioner accepts the findings of fact, but takes exception to the conclusions of law. It contends that the exclusion of electricity as a good does not make the claimed assets ineligible for the manufacturing ITC. Based upon ***Matter of Brooklyn Union Gas Co. v New York State Tax Appeals Trib.*** (107 AD3d 1080 [2013]), petitioner argues that it is appropriate to consider the eligibility of an asset in isolation, i.e., irrespective of the ultimate output or end result. Under this theory, it follows that an asset may be eligible for the manufacturing ITC even if the entire system, or the end result, would not be eligible for the credit. Applied herein, petitioner submits that although part of the electricity generating process, the claimed assets are eligible for the manufacturing ITC because they created steam from water, and water from steam.

Regarding the pollution control ITC, petitioner contends that its systems meet the statutory definitions of facilities. It argues that its systems comply with the legislative intent because they prevent the release of radionuclides into the air, and treat liquid waste before its release into New York waters. However, petitioner submits that DEC denied certification solely because the NRC regulates nuclear emissions. Therefore, petitioner contends that requiring DEC certification violates its rights under the Equal Protection and Due Process Clauses.

Petitioner submits that it is entitled to the IMBC because, as argued above, it produced steam and water, which meets the definition of manufacturing or processing goods. It also argues that it is entitled to the EIC because its systems are properly eligible for the ITC available for manufacturing equipment, industrial waste treatment facilities, and pollution control

facilities. Accordingly, petitioner requests that this Tribunal reverse the determination, cancel the refund denials, and grant the manufacturing and pollution control ITC, the EIC, and the IMBC.

The Division argues that the determination should be affirmed. It contends that the manufacturing ITC does not apply to the claimed assets because they were used in the production of electricity. The Division notes that the purpose of the 1993 amendment to Tax Law § 210.12 was to make electricity-producing equipment ineligible for the manufacturing ITC. It notes that petitioner agrees that the claimed assets were necessary to generate electricity at the Ginna and Nine Mile nuclear power plants, and that the sole purpose of creating steam was to turn the turbines and generators to produce electricity. Accordingly, the Division submits that it properly denied this refund claim because the Legislature did not intend electricity producers to receive the manufacturing ITC.

The Division also contends neither the law nor the facts support the "in isolation," or asset-by-asset approach advanced by petitioner. It argues that in ***Brooklyn Union Gas***, the Court considered the individual assets in the context of the primary purposes of the gas delivery system. Thus, it submits that petitioner's asset-by-asset approach results from a misreading of the case, and is inconsistent with other manufacturing ITC jurisprudence. Turning to the facts, the Division submits that, when individual parts are severed from the plants, the claimed assets do not manufacture anything. Rather, the Ginna and Nine Mile plants require all the claimed assets, working together with other assets, to produce their electricity. As such, the Division contends that under these facts, an asset-by-asset approach does not establish clear entitlement to the manufacturing ITC.

The Division also argues that, in this context, creating steam from water and water from steam does not constitute manufacturing. It notes that in order for a process to be considered manufacturing, the end result must materially differ from the starting materials. Considering the claimed assets together, the Division notes that the end result of these processes leaves petitioner with the same product as that with which it started: water.

Regarding the pollution control ITC, the Division submits that the Administrative Law Judge properly sustained the denial. It notes that the record establishes only that petitioner sought the requisite DEC certification and did not receive it. As argued by the Division, it does not prove that petitioner's claimed facilities at Ginna and Nine Mile actually met the requirements set forth in the ECL or DEC regulations. Moreover, the Division contends that the DEC denial letters do not state that the certification could not be granted due to federal preemption. Given that petitioner failed to meet an express condition of the statute, the Division submits that the Administrative Law Judge properly determined that petitioner could not claim the pollution control ITC for the claimed facilities.

The Division also disagrees with petitioner's argument regarding the IMBC. Raising the same arguments regarding electricity, the Division contends that petitioner is not entitled to this credit because it has not established that it produced a "good." Regarding the EIC, the Division notes that petitioner is not entitled to the EIC because it failed to establish entitlement to any ITC under Tax Law § 210.12. Accordingly, the Division requests that this Tribunal affirm the determination of the Administrative Law Judge in its entirety.

OPINION

The instant matter presents the question of whether petitioner is entitled to various tax credits, including the manufacturing and pollution control ITC, as well as the EIC, and the

IMBC. Tax credits are "a particularized species of exemption from taxation" (***Matter of Grace v New York State Tax Commn.***, 37 NY2d 193, 197 [1975], ***lv denied*** 37 NY2d 708 [1975]). Petitioner must prove "a clearcut entitlement" to its sought-after credits (***Matter of Golub Serv. Sta. v Tax Appeals Trib. of State of N.Y.***, 181 AD2d 216, 219 [1992]), because statutes providing exemptions must be strictly construed against the taxpayer (***see e.g. Matter of 677 New Loudon Corp. v State of NY. Tax Appeals Trib.***, 19 NY3d 1058 [2012], ***cert denied*** 134 S Ct 422 [2013]). However, such statutes should not be interpreted "so narrowly as to defeat their settled purposes" (***see e.g. Matter of Piccolo v New York State Tax Appeals Trib.***, 108 AD3d 107, 112 [2013]). Bearing these principles in mind, we address each tax credit separately.[4]

Manufacturing ITC and the IMBC

Petitioner seeks the manufacturing ITC for certain assets at its Ginna and Nine Mile nuclear power plants. This credit is provided for tangible property "principally used by the taxpayer in the production of goods by manufacturing or processing . . . " (Tax Law § 210.12 [b] [i]; ***see also*** 20 NYCRR 5-2.4 [a]).[5] As relevant herein, the statute defines manufacturing as:

> "the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which has already gone through some artificial process by the use of machinery, tools, appliances, and other similar equipment" (Tax Law § 210.12 [b] [i]).

Property used in manufacturing includes "all facilities used in the production operation"(20 NYCRR 5-2.4 [b]). As used in Tax Law § 210.12 (b) (i), "goods" constitute "tangible movable personal property having intrinsic value" (***Matter of Leisure Vue v***

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[4] We note at the onset that the terms "equipment," "systems," "assets," and "items" are used interchangeably, and refer, generally, to the subject component parts of the Nine Mile and Ginna nuclear power plants.

[5] The remaining eligibility requirements are not at issue herein (***see*** Tax Law § 210.12).

Commissioner of Taxation & Fin., 172 AD2d 872, 873 [1991]), which includes items that are "capable of being owned, bought and sold" (***Matter of Clark***, Tax Appeals Tribunal, September 14, 1992). However, "the term 'goods' shall not include electricity" (Tax Law § 210.12 [b] [i]), thereby excluding equipment used in producing electricity from eligibility for this ITC. As properly determined by the Administrative Law Judge, herein, the threshold question is whether the claimed assets were principally used in electricity production.

Cases involving the manufacturing ITC and the production sales tax exemption guide our analysis of the subject equipment at the Nine Mile and Ginna nuclear power plants.[6] Analyzing an item's principal use "requires an evaluation of the equipment in the context in which it is used" (***Matter of B.R. DeWitt, Inc.*** Tax Appeals Tribunal, September 19, 1991). Put alternatively, the facts must be reviewed to determine the specific role of the claimed equipment in accomplishing the manufacturing or processing activity (***see e.g. Matter of Envirogas, Inc. v Chu***, 114 AD2d 38, 42 [1986]).

As noted by the Administrative Law Judge, the facts of the instant matter closely resemble those of ***Niagara Mohawk Power Corp. v Wanamaker*** (286 AD 446 [1955], ***affd*** 2 NY2d 764 [1956]). Therein, the Court considered whether a taxpayer could claim a production sales tax exemption for equipment in its coal-fired power plant. The dispute specifically centered on whether the electricity production process included equipment such as structures, supports, and machinery. The Court opined the following:

> "There is no simple test of what constitutes 'consumption directly and exclusively in the production' of electricity. The basic questions are the

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[6] Although it serves a broader purpose than the ITC (***see e.g. Matter of Pantelopoulos v Commissioner of Taxation and Fin.***, 213 AD2d 768, 769-770 [1995], ***confirming Matter of Pantelopoulos***, Tax Appeals Tribunal, December 2, 1993), the production sales tax exemption has been construed similarly to the manufacturing ITC (Tax Law §§ 1115 [a] [12], 210.12 [b] [i]; ***see Matter of Pantelopoulos***; ***Matter of Clark***).

> following: (1) Is the disputed item necessary to production? (2) How close, physically and causally, is the disputed item to the finished product? (3) Does the disputed item operate harmoniously with the admittedly exempt machinery to make an integrated and synchronized system?
>
> After much study of the matter, we have concluded that the purchase or use of the coal and ash handling equipment is not taxable. That equipment is as essential to production as the generator itself. A serious breakdown in it would quickly stop or impair the output of electricity. We are further impressed with the synchronization and integration of the boiler and coal and ash equipment. The one could not operate without the other. Working together they make up a system which supplies the power from which electricity is produced.
>
> We have also concluded that structures at the Huntley steam station are not subject to the sale and use taxes. The structures and supports which house and steady the machinery are essential to production. They are physically annexed to the machinery, specifically designed therefor, and necessary to the proper functioning thereof. As a whole, the plant is a producing unit. The structures do not play as active a role as, for example, the turbine. But activity is not the test of directness. The walls of the boiler have a 'passive' function in one sense. The important thing is that all parts of the plant contribute, continuously and vitally, to production, and they are all integrated and harmonized" (***Niagara Mohawk*** at 449).

Similarly, in ***Matter of Clark***, this Tribunal found that the equipment in a hydroelectric plant qualified for the manufacturing ITC because all components in the process were involved in producing electricity, which, at the time, could be considered a good (Tax Law former § 606 [a]).[7]

We now turn to the facts of the instant matter. Regarding Nine Mile, the claimed assets include the plant's structures, nuclear fuel, and all equipment related to transferring the steam to the turbine, and recycling it as water (e.g., steam lines, condensers, heat exchangers). The claimed assets at Ginna include the containment structure and all of its containing equipment,

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[7] It was in response to ***Matter of Clark*** that the Legislature amended the Tax Law to exclude electricity production from eligibility for the manufacturing ITC (Bill Jacket, Memorandum in Support, L 1993, ch 57, p 35).

and all equipment relating to transferring the steam to the turbine and recycling it as water (e.g., steam lines, condensers, heat exchangers).

In reviewing the record, we conclude that the claimed assets were principally used in the production of electricity. The record establishes that these items provided necessary functions in the plants' electricity generation processes. From a practical perspective (***Niagara Mohawk*** at 449; ***Matter of Clark***), these plants operated as single production units, in which the claimed assets contributed continuously, harmoniously, and vitally to producing electricity from nuclear fuel. Accordingly, the Administrative Law Judge properly determined that petitioner could not claim the subject assets for the manufacturing ITC because they were principally used in producing electricity.

Contrary to petitioner's argument, the Appellate Division decision in ***Brooklyn Union Gas*** affirms that the key inquiry is whether the claimed equipment is principally used to manufacture a usable product that substantially differs from the beginning inputs (***see e.g. Matter of Astoria Fin. Corp. v Tax Appeals Trib. of State of N.Y.***, 63 AD3d 1316 [2009]). In that case, the taxpayer claimed that its gas delivery system constituted manufacturing because certain necessary adjustments were made to the gas during its transportation.

While deferring to this agency's interpretations of the ITC (***Brooklyn Union Gas*** at 1082), the Court found that, as a whole, the system engaged in gas delivery, and did not significantly alter the gas. Reviewing the roles of the equipment relative to this primary function, the Court concluded that the functions of the claimed equipment facilitated delivery, and that they "did not significantly change [the gas] from how it was received" (***Brooklyn Union Gas***, 107 AD3d at 1082; ***see also Matter of B.R. DeWitt***, Tax Appeals Tribunal, September 19, 1991).

As a result, the Court confirmed that the taxpayer could not claim the manufacturing ITC for its distribution system.

In this case, petitioner relies upon ***Brooklyn Union Gas*** for the proposition that the claimed equipment should be viewed asset-by-asset, or "in isolation," and apart from their roles in electricity production at the Nine Mile and Ginna power plants. In ***Niagara Mohawk***, the taxing authority utilized the same asset-by-asset approach to deny the production sales tax exemption for equipment at the taxpayer's coal-fired power plant. The Court rejected this view, stating the following:

> "A taxing statute should receive a practical construction (Matter of Mendoza F. D. Works. v. Taylor, 272 N.Y. 275, 281) . . . . It is not practical to divide a generating plant into 'distinct' stages. It was not built that way, and it does not operate that way. The words 'directly and exclusively' should not be construed to require the division into theoretically distinct stages of what is in fact continuous and indivisible" (***Niagara Mohawk*** at 449).

We similarly reject this argument because it does not comport with the facts of this case. As explained in ***Niagara Mohawk***, it is inappropriate to artificially divide a unitary process when the facts show that the parts and steps operate interdependently and indivisibly in accomplishing a singular task. Herein, the claimed assets at Nine Mile and Ginna operated in unified, integrated processes that harnessed the energy from nuclear fission and produced electricity. Viewed in isolation, the individual pieces of equipment produced nothing. Only working in concert, as complete nuclear power plants, did the claimed assets accomplish their tasks. As such, an asset-by-asset approach does not comport with the facts of this case, and, therefore, does not aid petitioner in establishing clear entitlement to the manufacturing ITC.

Petitioner also fails to persuade us by arguing that Nine Mile and Ginna principally produced steam from water and water from steam. As is proper (***Matter of B.R. DeWitt***; ***Matter***

of Clark), we note that petitioner is in the business of generating and selling electricity. As discussed above, it is inappropriate to divide the unified production processes at the these power plants. Herein, steam exists only as an intermediary used to convey energy from nuclear fission, in the form of heat, to the turbines and generators. Within the same, enclosed process, the steam is condensed back into water so that it may repeat the cycle. It is, therefore, factually accurate to describe the water usage in the plants' electricity production as water-to-water recycling. Applying ***Brooklyn Union Gas***, the question is whether the starting water materially differs from the ending water.

The record fails to clearly establish that the resulting water constitutes a different product than the starting material. Contrary to petitioner's arguments, there is no basis to analogize water recycling within the Nine Mile and Ginna power plants to snow-making machines at ski resorts (***Vail Associates, Inc. v Commissioner***., 88 TC 1391 [1987]; ***Matter of Plattekill Mountain Ski Center***, State Tax Commission, August 1, 1985). A snow-making machine clearly produces a good, suitable for use, which differs from the starting material (water). Herein, the resulting water did not differ from the starting water because it was incapable of either leaving the system or being used for any process other than producing electricity, which renders it ineligible for this ITC (Tax Law § 210.12 [b] [i]). As such, petitioner failed to carry its burden of establishing that the claimed equipment was principally engaged in producing a good suitable for use.

Turning to the IMBC, during the years at issue, Tax Law § 210.26-a (a) provided a credit for energy taxes to taxpayers conducting industrial or manufacturing businesses. This section defined an industrial or manufacturing business as "a business which during the taxable year is principally engaged in activities described in [Tax Law § 210.12 (b) (i) (A), (B), or (C)]" (Tax Law § 14-a [b]). As discussed above, the record does not clearly establish that petitioner

principally engaged in manufacturing. Therefore, the Administrative Law Judge properly sustained the denial of the IMBC.

Pollution Control ITC

Tax Law § 210.12 (b) (i) (B) provides an ITC for industrial waste treatment facilities (Tax Law § 210.12 [b] [ii] [C]), as well as air pollution control facilities (Tax Law § 210.12 [b] [ii] [D]). This section also conditions the credit upon the following:

> "[S]uch credit shall be allowed with respect to industrial waste treatment facilities and air pollution control facilities only on condition that such facilities have been certified by the state commissioner of environmental conservation or his designated representative, pursuant to subdivision one of section 17-0707 or subdivision one of section 19-0309 of the environmental conservation law, as complying with the provisions of the environmental conservation law, the public health law, the state sanitary code and codes, rules, regulations, permits or orders issued pursuant thereto" (Tax Law § 210.12 [b] [iii]).

Herein, petitioner sought DEC certification for a combined total of 18 systems as industrial waste treatment facilities on the basis that they collected, controlled, treated, and stored liquid waste from Ginna and Nine Mile. Petitioner also applied for 27 systems as air pollution control facilities on the basis that they barred the release of radionuclides into the air. The record establishes that none of these systems received the requisite DEC certification.

The lack of certification is dispositive of this issue. Eligibility for this credit expressly requires DEC certification of compliance with certain laws (Tax Law § 210.12 [b] [iii]). DEC did not certify the subject equipment. The plain language of the statute requires the certification. Accordingly, the Administrative Law Judge properly sustained the denial of the pollution control ITC because petitioner failed to establish clear entitlement to these credits.

We are also not persuaded by the constitutional arguments raised by petitioner. Initially, these arguments appear to be a facial challenge because the remedy sought by petitioner

necessarily results in invalidating the DEC certification requirement in all instances (***id.***). Therefore, as this forum may only address as-applied challenges (***Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003), we lack the jurisdiction to consider these arguments.

However, even if construed as as-applied challenges, the constitutional arguments must fail in this instance. For petitioner to prevail on either the preemption argument,[8] or the Equal Protection claim, it must first establish that the facilities met the ECL and regulatory requirements for certification. Petitioner has not shown that in this case. Furthermore, this is not the proper forum for determining if the subject facilities met the requisite pollution control standards. The Legislature assigned the certification process to DEC because of its expertise in this area. Given the foregoing, we sustain the denial of the pollution control ITC.

EIC

Tax Law § 210.12-D provides an EIC to taxpayers that are entitled to an ITC under Tax Law § 210.12. Petitioner is not entitled to claim any EIC because it failed to prove entitlement to either the manufacturing or pollution control ITC. Accordingly, the Administrative Law Judge properly sustained the denial of the EIC.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Constellation Nuclear Power Plants LLC is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Constellation Nuclear Power Plants LLC is denied; and,

[8] In our view, federal regulation of nuclear facilities does not necessarily preempt DEC from issuing certification for purposes of the pollution control ITC.

4. The denial of refund claims, dated March 8, 2007, is sustained.

DATED: Albany, New York
June 18, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr
James H. Tully, Jr.
Commissioner