

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

COLUMBIAN MUTUAL LIFE : DECISION
INSURANCE COMPANY :

for Redetermination of Eligibility for Corporation
Franchise Tax Credits under Article 9-A of the Tax :
Law for the Year 1983.

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 1, 1987 with respect to a petition by Columbian Mutual Life Insurance Company, c/o DeGraff, Foy, Conway, Holt-Harris & Mealey, 90 State Street, Albany, New York 12207. The petition was filed for redetermination of eligibility for corporation franchise tax credits under Article 9-A of the Tax Law for the Year 1983 (File No. 801403). Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

The petitioner and the Division of Taxation each filed a brief on this matter. Oral argument, at the request of the petitioner, was heard on February 10, 1988.

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

ISSUE

Whether the petitioner should be denied renewal of a certificate of eligibility for corporation franchise tax credits because the number of jobs it maintained for the tax period fell below the number required by the Division of Taxation - five above the number existing at the time of its initial approval as an eligible business facility.

FINDINGS OF FACT

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

The New York State Job Incentive Board ("JIB") was created in 1968 to encourage industrial and other business enterprises to locate, expand and improve facilities in economically underprivileged urban areas and to provide job opportunities and job training programs for residents of such areas. To meet these goals JIB was empowered to grant tax credits against the State corporation franchise tax to eligible corporations. (See, Governor's Memorandum, 1968 NY Legis Ann, at 494; L 1968, ch 1054.)

Petitioner, in order to better compete in the life insurance business, applied for and received approval from the New York State Insurance Department for construction of an addition to its home office in Vestal, New York.

Petitioner began construction in late 1978. The project doubled the size of petitioner's facility. Its initial application to JIB for a Certificate of Eligibility for State Franchise Tax Credits and for Local Real Property Exemptions, dated July 17, 1979, listed 125 jobs at the Vestal facility before completion of the project, and 138 after completion of the project.

On or about November 20, 1979, JIB approved petitioner's application and authorized the issuance of a letter of intent to issue a certificate of eligibility. The application was approved on

the basis of 110 jobs retained and 10 jobs created for a total of 120 jobs, excluding executive officers.

For the years 1980, 1981 and 1982 petitioner's eligibility for the credits was certified by JIB. The employment figures were 124, 121 and 117, respectively.

Effective April 1, 1983, the legislation creating JIB was repealed; however, the provisions of the Commerce Law governing eligibility for tax credits were continued in effect for those taxpayers who had received initial approval for eligibility prior to July 1, 1983. JIB's responsibilities for monitoring corporate franchise tax credits of previously certified units were transferred to the Department of Taxation and Finance. (L 1983, ch 15, §57; Tax Law §210.11[h].)

On January 23, 1984, petitioner filed an affidavit of compliance for 1983 where it reported 103 jobs retained and no new jobs created. It also certified that it had provided approved training programs for eight employees in that fiscal year.

The net decrease in the-number of retained jobs reported by petitioner in 1983 in comparison with prior years resulted in part from an improvement in petitioner's accounting system and a concomitant layoff of 14 clerical employees. Petitioner upgraded its computers and converted from a system employing keypunched data cards to one employing a magnetic tape. Because of the increased speed and efficiency of the new system, fewer clerical employees were required to carry on the operation.

Petitioner identified 14 jobs which originated between 1978 and 1983 in areas other than the accounting area. These 14 jobs did not exist before the commencement of its participation in the JIB program, and the jobs continued to be filled at the end of 1983.

After review of the affidavit of compliance, the Division of Taxation determined that petitioner did not qualify for a franchise tax credit for 1983. By letter dated June 7, 1984, the Division of Taxation explained its decision as follows:

"The Certificate of Eligibility was disallowed in accordance with New York State Department of Commerce Law, under Article 9-A, Section 120, which states in part that a Certificate of Eligibility may be revoked by the Job Incentive Board, if the Board finds that there has been a material change of fact, since the date the Certificate of Eligibility was issued.

The basic intent of the Law, was to encourage business enterprises to expand facilities and increase employment in New York State.

The Job Incentive Board approved your application for a base level of employment of 110 employees and creation of 5 or more additional jobs.

The corporation has been issued prior Certificates of Eligibility, since employment level maintained 115 employees of [sic] more.

The decrease in employment to 103 employees as shown on your Affidavit of Compliance for the period ending December 31, 1983, is a material change in fact and the corporation has not met the intent of the program to increase employment in New York State.

Therefore, your Certificate of Eligibility is revoked for the period ending December 31, 1983."

To explain the criteria it employed in determining that petitioner was not eligible for a tax credit in 1983, the Division of Taxation introduced guidelines developed and employed by JIB "to determine if jobs were retained". In pertinent part, they state:

"I. Retention in place with expansion.

I. a. If firm increases space by 25% or more and creates 5 new jobs. all jobs prior to project start are considered as retained.

b. If a firm increases the number of jobs by at least five and such increase represents a 25% or more increase, then all jobs prior to the project start are considered as retained."

As interpreted by the Division of Taxation, the guidelines made it necessary for an applicant to maintain an employment level at least five jobs above the number of "retained jobs" existing at the time of its initial approval as an eligible facility. Petitioner was denied eligibility for the franchise tax credit for 1983 because it did not meet this requirement.

OPINION

The Administrative Law Judge determined that petitioner was entitled to the credit. We agree.

Commerce Law section 118, paragraphs (a) through (e) sets forth the requirements which must be met in order for a business to be eligible for tax credits. The sole requirement pertinent to this inquiry is found in paragraph (c) which states: "It shall be a facility which creates or retains in the eligible area in which it is located not less than five jobs." (Emphasis added.)

The Division of Taxation has not adopted regulations concerning the JIB program (compare, eg., 9 NYCRR 198, adopted by the State Board of Equalization and Assessment) but has relied upon the JIB guidelines in carrying out its responsibilities. These guidelines, while not having the force and effect of a regulation (see, Leichter v. Barber, 120 AD2d 776), are relevant to our deliberation since they were utilized by the Division in its review of petitioner's application for continued eligibility in the program.

We agree with the Division's assertion that a "base year employment figure" is appropriate to determine continued annual eligibility of a taxpayer over the ten year life of the credit. Here the base was 110 jobs. Thus, reduction of the number of jobs to 103 would appear to render the petitioner ineligible.

However, the guidelines also provide a measure of flexibility, namely:

"If a firm must replace obsolete equipment in order to remain competitive and brings such situation to the Board before the fact and can document to the satisfaction of the Board its competitive disadvantage with its present equipment, the firm would get 'jobs retained credit for all those jobs associated with such replaced equipment.' If the number so retained exceeds 60% of the total work force, then all the jobs in the facility would be considered as jobs retained." (JIB Guidelines III a.)

Here, petitioner's staff reductions were part of a modernization effort whereby manual keypunched data cards were replaced by magnetic tapes. As the Administrative Law Judge determined, "[petitioner's] net decrease in jobs in 1983 resulted from an improvement of its computer system and an accompanying increase in efficiency. It would be contrary to the spirit and intent of the program to demand that an eligible business facility maintain an outmoded system of production as the price of continuing its eligibility for tax credits. In its affidavit of compliance for 1983, petitioner certified that it had provided approved training programs for eight employees in that fiscal year. In other documents submitted to the Division of Taxation, it asserted that fourteen jobs had been created and continued to be retained because of petitioner's investment in the new business facility." These factors, along with petitioner's investment in eligible property, persuade us that petitioner's eligibility for 1983 should have been approved by the Division.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Columbian Mutual Life Insurance Company is granted, and its

Certificate of Eligibility for Corporation Franchise Tax Credit shall be extended for the period ended December 31, 1983.

DATED: Albany, New York

AUG 04 1988

President
John P. Dugan

Francis R. Koenig
Commissioner