STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions of **ACCESSORIES BY PEARL, INC.** for Redetermination of Deficiencies or for Refunds of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended June 30, 1981, 1982, 1983 and 1984.	DECISION DTA NOS. 801583 AND 803554

Petitioner, Accessories by Pearl, Inc., 330 Fifth Avenue, New York, New York 10001, filed an exception to the determination of the Administrative Law Judge issued on May 5, 1988 with respect to its petitions for redetermination of deficiencies or for refunds of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended June 30, 1981, 1982, 1983 and 1984 (File Nos. 801583 and 803554). Petitioner appeared by Siegel, Mendlowitz & Rich, P.C. (Randy Blaustein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

Neither of the parties filed a brief on exception. Oral argument was neither requested nor heard.

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

ISSUE

Whether petitioner is entitled to an employment incentive tax credit in the fiscal years ended June 30, 1981 and 1982 pursuant to Tax Law section 210.12-A for property acquired during the fiscal years ended June 30, 1978 and 1979, despite petitioner's failure to timely apply for the investment tax credit with respect to such property.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination except that we

change all references by the Administrative Law Judge from the "additional investment tax credit" to the "employment incentive tax credit." Such facts are incorporated herein by this reference. The facts relevant to the issue on exception are summarized below. In addition to the facts found by the Administrative Law Judge, we find certain additional facts as indicated below.

Accessories by Pearl, Inc. (hereinafter "Accessories"), a New York corporation engaged in the business of manufacturing women's belts, filed timelycorporation franchise tax reports for the fiscal years ended June 30, 1978, 1979, 1981 and 1982. Petitioner did not file claims for investment tax credit with those reports filed for the fiscal years ended June 30, 1978 and 1979. However, claims for employment incentive tax credit for property acquired during fiscal years ended June 30, 1978 and 1979 were filed with the reports for fiscal years ended June 30, 1981 and 1982.

On September 20, 1984, petitioner, by its representatives, Siegel, Mendlowitz & Rich, P.C., filed with the Division forms CT-46, Claim for Investment Tax Credit, for the fiscal years ended June 30, 1978 and 1979. For the period ended June 30, 1978, petitioner claimed a net investment tax credit of $122.00 on machinery used to produce belts which machinery was acquired on December 30, 1977 and June 30, 1978. For the fiscal year ended June 30, 1979, petitioner claimed a net investment tax credit of $4,849.00 on machinery used to produce belts which machinery was acquired on December 31, 1978 and June 30, 1979.

Petitioner filed claims for investment tax credit for the periods ended June 30, 1981 and June 30, 1982 with its corporation franchise tax reports for those respective years. On schedule C of each CT-46, Claim for Investment Tax Credit, petitioner claimed the employment incentive tax credits for the fiscal years ended June 30, 1978 and 1979. For the fiscal year ended June 30, 1981, petitioner claimed that $122.00 was the amount of the original investment tax credit granted in the fiscal year ended June 30, 1978 and that an employment incentive tax credit of $61.00 was claimed for the fiscal year ended June 30, 1981. For the fiscal year ended June 30, 1982, petitioner claimed an original investment tax credit for the fiscal year ended June 30, 1979 of $4,849.00 and an employment incentive tax credit of $2,425.00 for the fiscal year ended June 30, 1982. These two claims for the

employment incentive tax credit were made despite the fact that no investment tax credit had been granted or applied for with respect to the fiscal years ended June 30, 1978 or June 30, 1979.

On June 29, 1984, pursuant to a desk audit performed by the Division of Taxation, a Statement of Audit Adjustment was issued to petitioner which stated a tax deficiency for the fiscal year ended June 30, 1981 of $2,470.00 and interest of $1,085.59, for a total balance due of $3,555.59. Said statement explained that because no forms CT-46 (claim for investment tax credit) were filed and no investment tax credit was claimed on petitioner's New York State franchise tax reports for the periods ended June 30, 1978 and June 30, 1979, no employment incentive credit could be claimed for those years. Employment incentive credit claimed in the amounts of $61.00 (6/30/78) and $2,425.00 (6/30/79) was disallowed.

On June 29, 1984, the Division issued a Statement of Audit Adjustment to petitioner for the fiscal year ended June 30, 1982 setting forth a tax deficiency of $3,419.00 and interest of $549.00, for a total balance due of $3,968.69. Said statement explained that the deficiency was based in part on the disallowance of an employment incentive tax credit of $2,425.00, based on the explanation in the statement of audit adjustment for the period ended June 30, 1981.

On September 12, 1984 the Division issued two notices of deficiency to Accessories assessing tax in the amount of $2,470.00 for the fiscal year ended June 30, 1981 and $3,419.00 for the fiscal year ended June 30, 1982.

We find as an additional fact that the Division conceded at hearing that petitioner's property qualified for the employment incentive tax credit. We also find that petitioner established that its average number of employees during each of the fiscal years ended June 30, 1981 and June 30, 1982 was at least one hundred and one percent of the average number of employees during the fiscal years ended June 30, 1977 and June 30, 1978.

OPINION

The Administrative Law Judge the sustained notices of deficiency issued by the Division of Taxation to petitioner for the fiscal years ended June 30, 1981, 1982, 1983 and 1984 involving several issues. On exception only the deficiency concerning the fiscal years ended June 30, 1981 and

1982 is at issue. The petitioner has taken exception only to the Administrative Law Judge's conclusion that petitioner's failure to timely claim the investment tax credit precluded the claim for the employment incentive tax credit. Since we have found above that petitioner satisfied all of the other statutory conditions for the employment incentive credit, the only issue we need address is whether the failure to timely claim the investment tax credit is fatal to the claim for the employment incentive tax credit.

The petitioner argues that the Administrative Law Judge misconstrued the law. The Division of Taxation requests that we sustain the determination of the Administrative Law Judge.

We reverse the determination of the Administrative Law Judge on this issue.

The employment incentive credit is provided for by Tax Law section 210.12-A. This section provides in pertinent part as follows:

> "Where a taxpayer is allowed a credit under subdivision twelve, with respect to property, the acquisition, construction, reconstruction or erection of which commenced on or after the first day of January, nineteen hundred seventy-six, the taxpayer shall be allowed a credit for each of the three years next succeeding the taxable year for which the credit under subdivision twelve is allowed with respect to such property whether or not deductible in such taxable year or in subsequent taxable years pursuant to paragraph (e) of such subdivision twelve, of fifty percent of the credit allowable under subdivision twelve; provided, however, that the credit allowable under this subdivision for any taxable year shall only be allowed if the average number of employees during such taxable year is at least one hundred one per cent of the average number of employees during the taxable year immediately preceding the taxable year for which the credit under subdivision twelve is allowed."

The Administrative Law Judge based his conclusion denying the employment incentive tax credit on the language "[w]here a taxpayer is allowed a credit under subdivision twelve." Implicit in this conclusion is the interpretation that "allowed" means <u>both</u> claimed by the taxpayer and granted by the words of the statute. While the second condition is plainly stated by the statute, the condition that the taxpayer actually claim the credit is not. The issue is solely one of statutory interpretation: what did the Legislature mean when it used the term "allowed" with reference to the ITC under subdivision twelve?

Neither of the parties have directed us to any statutory authority - regulations or case law - to

support their respective interpretation. Although we have found no authority directly on point, we have found an analogous situation under the net operating loss deduction provided for by section 172 of the Internal Revenue Code. Section 172(c) of the Code defines net operating loss to mean the excess of deductions allowed by the Code over gross income. The Internal Revenue Service ruled that a taxpayer who failed to timely claim a deduction for a particular year could take into account the time barred deduction for purposes of calculating a net operating loss for the closed year to carry forward to an open year (*Rev. Rul.* 81-88, C.B. 1981-1, 585). This recalculation of the net operating loss for the closed year was allowed even though a credit or refund was not timely and could not be made for the closed year. The Service based its ruling on the principal that taxable income for purposes of the net operating loss means correct taxable income, not merely that reported by the taxpayer. Implicit in this principal is that deductions "allowed" by the Code as used in section 172(c) means the correct deductions not merely those claimed by the taxpayer. The Service based its ruling on the court decisions in ***Springfield Street Railway Co. v. United States***, 312 F2d 754 (Ct. Cl. 1963); ***Commissioner v. Van Bergh***, 209 F2d 23 (2d Cir 1954); ***Phoenix Coal Co. v. Commr.***, 231 F2d 420 (2d Cir 1956); ***State Farming Co. v. Commr.***, 40 T.C. 774 (1963); ***ABKCO Industries, Inc. v. Commr.***, 56 T.C. 1083 (1971), ***aff'd on other grounds***, 482 F2d 150 (3d Cir 1973). Clearly, the rationale of the Service's ruling supports the conclusion that "allowed" as used in the employment incentive credit means only as granted by the terms of the statute - the correct investment tax credit - and is not limited to that claimed by the taxpayer.

We are sensitive to the fact that circumstances specific to the employment incentive credit could require that "allowed", in this context, have a different meaning; however, the Division has offered no circumstances or policy considerations to support this result[1]. Our own analysis indicates

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[1]In contrast see ***Matter of Gotte's Luncheonette, Inc.***, Tax Appeals Tribunal, August 25, 1988, where we held that an Article 9-A taxpayer was not entitled to a net operating loss deduction under section 208.9(f) of the Tax Law because the taxpayer did not prove the amount of such deduction claimed on the Federal returns for the corresponding years. Underlying this decision was the policy consideration of Federal conformity which had already resulted in the conclusions that the amount of the State net operating loss deduction cannot exceed the amount deducted on the Federal return (***Matter of Telmar Communications Corp. v. Procaccino***, 48 AD2d 189) and that the source year of the net operating loss deducted on the State return and Federal return must be the same (***Matter of Lehigh Valley Industries, Inc.***, Tax Appeals Tribunal, May 5, 1988). In any event, the petitioner in

that policy considerations favor granting the employment incentive tax credit on the instant facts. Clearly, this credit was designed to provide a tax benefit to taxpayers who both invested in certain property and who increased their number of employees. Here the petitioner has satisfied both criteria. Petitioner's only failure was its failure to take advantage of the other credit to which it was entitled. We see no reason why this failure should require the denial of the subsequent credit. The only foreseeable administrative impact of our conclusion is that in other similar cases the Division would have to review the claim for the employment incentive tax credit on the merits to see if the taxpayer qualified, rather than simply denying the claim on the procedural point that no claim for the investment tax credit had been made. Certainly, this is a minor impact, only requiring the Division to perform the same review it would have done had a timely claim for an investment tax credit been made. In such cases, any problem of proving qualification for the credit caused by the additional passage of time will disadvantage only the taxpayer, since the taxpayer has the burden to prove entitlement to the credit. In sum, we see absolutely no policy considerations to justify denying the employment incentive tax credit in these circumstances.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Accessories by Pearl, Inc., is granted to the extent that petitioner is entitled to an employment incentive tax credit claimed in the fiscal years ended June 30, 1981 and 1982 pursuant to Tax Law section 210.12-A for property acquired during the fiscal years ended June 30, 1978 and 1979;

2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph “1” above, but except as so modified is affirmed; and

3. The petitions of Accessories by Pearl, Inc. are granted to the extent indicated in paragraph “1” above and the Division of Taxation is directed to modify the notices of deficiency issued on September 12, 1984 accordingly, but except as so granted the petitions are in all other respects denied and the notices of deficiency issued on September 12, 1984, May 2, 1986 and May 13, 1986

Gotte's did not prove that he was entitled to claim a Federal net operating loss deduction but failed to claim it; instead the facts were simply that a Federal net operating loss deduction was taken.

are in all other respects sustained.

Dated: Albany, New York
February 24, 1989

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

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