

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SOFCO, INC. : DECISION
for Redetermination of Eligibility for Corporation :
Franchise Tax Credits under Article 9-A of the :
Tax Law for the Fiscal Year Ended May 31, 1986. :

Petitioner Sofco, Inc., 702 Potential Parkway, Scotia, New York 12302, filed an exception to the determination of the Administrative Law Judge issued on November 15, 1990 with respect to its petition for redetermination of eligibility for corporation franchise tax credits under Article 9-A of the Tax Law for the fiscal year ended May 31, 1986 (File No. 804025).

Petitioner appeared by Mary Ann Racicot, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a brief in opposition to the exception. Oral argument was not requested.

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

ISSUE

Whether the Commissioner of the Department of Taxation and Finance properly refused to certify petitioner's eligibility for business facility tax credits because its business facility, which had received initial approval from the Job Incentive Board, was relocated.

FINDINGS OF FACT

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

In the summer of 1981, Dixico, Inc., the owner of Stevens and Thompson Paper Company, decided to shut down the paper company's manufacturing facility in Halfmoon, a town in Saratoga County. Petitioner, Sofco, Inc. (hereinafter "Sofco"), at the time, was a wholesaler of paper goods and owned a 130,000 square foot facility in Scotia, New York and rented a warehouse facility in Utica. It was interested in purchasing the Halfmoon manufacturing facility. By a letter dated August 24, 1981, Sofco sought advice from the Job Incentive Bureau of the New York State Department of Commerce whether job incentive tax credits would be available if it exercised an option to purchase the paper company's realty, machinery and equipment:

"It is our understanding that if Sofco did not exercise its' [sic] option, this facility would be closed and the machinery and equipment sold to a Massachusetts manufacturing firm. This would result in a loss of 24 jobs for New York State.

* * *

The availability of New York State job credits will be an important factor in our decision as to whether we exercise our option by August 31, 1981 to purchase this manufacturing facility...."

On October 20, 1981, the Job Incentive Board granted initial approval to Sofco's application for participation in the Job Incentive Program and advised petitioner:

"The next step for you to take in order to qualify for state tax credits...is to submit to the Board an Affidavit of Compliance.... Upon approval of the Affidavit by the Board, a Certificate of Eligibility will be issued to you....

The certificate...is to be submitted with your annual tax filing...."

Subsequently, the Job Incentive Board issued a Certificate of Eligibility for State Franchise Tax for the base period ended May 29, 1982. The certificate noted that Sofco's business facility in Halfmoon, which first became eligible for tax credits on August 1, 1981, had created or retained 38 jobs. For its fiscal year ended May 29, 1982, petitioner applied against its corporate franchise tax liability an Eligible Business Facility Tax Credit of \$8,526.00. Similarly, for fiscal years ended May 28, 1983, May 26, 1984 and June 1, 1985, petitioner received certificates of

eligibility and applied eligible business facility tax credits of \$24,991.00, \$24,539.00 and \$26,904.00 against its corporation franchise tax liability for the respective years.

By a letter dated September 10, 1986, the Division of Taxation determined that Sofco did not qualify for a franchise tax credit for the fiscal year ended May 31, 1986. The following explanation was provided:

"As the facility located at 602 Potential Parkway, Scotia, New York was not [emphasis in the original] approved by the Job Incentive Board, your Certificate of Eligibility for Eligible Business Facility has been denied."

According to the affidavit of James Gargiulo, Sofco's president, petitioner's manufacturing division, originally located at Elizabeth Street, Town of Halfmoon (Saratoga County), transferred its operations including personnel and equipment to 702 Potential Parkway, Scotia, New York, (Schenectady County) during the corporation's fiscal year ended May 30, 1986. Mr. Gargiulo also noted in his affidavit that "the transfer was due to hazardous conditions beyond the control of Sofco, Inc."

A review of correspondence between Sofco and its insurer, Hartford Fire Insurance Company, reveals that as early as September 1982, there was a problem with the amount of water available to fight a fire at the Halfmoon property. Edward J. Matthews, Inc., the sprinkler contractor who had serviced the sprinkler system covering the Halfmoon property since the 1950's, performed a test on the water mains servicing Sofco's warehouse and manufacturing building in Halfmoon, and in a letter to petitioner's insurance agency, dated October 15, 1984, stated:

"(W)e found that we still didn't have sufficient volume for the necessary fire protection for the spr. sys. covering the above property.... We have also found out that this property at one time had an alternate supply of water and the fire lines were serviced from two different points. Point #2 was disconnected and capped. I do believe that this is why we do not have the volume that once was available. The single source of supply that we now have comes off the City Main and we have also found out that the water supply is not properly gridded in...."

Subsequently, Sofco hired¹ The Environmental Design Partnership, an engineering firm, which analyzed the "fire flow conditions and hydraulic limitations" at the Halfmoon facility. The engineer's report dated February 22, 1985 reached the conclusion that:

"The entire main between the fire house and the factory would have to be replaced to enable fire flows of 750 gallons per minute at the factory [the minimum fire flow requirement at the plant according to the engineer]."

There is no specific evidence in the record concerning the expense and difficulty of replacing the entire main between the firehouse and the factory, but it is noted that the map (which has no designated scale) appended to the engineer's report shows the firehouse to be located more than five blocks from the factory. No doubt the cost to correct the flow problem was excessive, and instead Sofco decided to transfer the Halfmoon manufacturing operation to its Scotia location.

Mr. Gargiulo, in his affidavit, also stated that:

"(A)ll employees located at the Town of Halfmoon facility were offered a transfer to the Scotia facility which is within commuting distance of the Town of Halfmoon. That at the time of the change of location (October 1985 payroll records) the Halfmoon facility had 31 employees who resided in the immediate area of the facility. That in the year subsequent to the transfer (May 1986 payroll records) there were 28 employees who were residents of the Halfmoon/Mechanicville area."

OPINION

The Administrative Law Judge held that petitioner was not entitled to the business facility tax credits because the facility for which petitioner had received approval from the Job Incentive Board had been relocated. The Administrative Law Judge determined that the Commissioner of the Department of Taxation and Finance (hereinafter the "Commissioner") did not have the authority to modify petitioner's original certificate of eligibility to allow credits for a facility in a different location from that approved by the Job Incentive Board.

¹The engineering firm was initially retained to prepare engineering drawings for the installation of 800 feet of 10" ductile iron water main which had been proposed as a solution for upgrading the flow of water at the plant.

On exception, petitioner argues, as it did before the Administrative Law Judge, that pursuant to Tax Law § 210(11)(h), the Commissioner has the power to modify a certificate of eligibility for tax credits and that the Commissioner should exercise that power to allow credits for petitioner's relocated facility.

The Division of Taxation (hereinafter the "Division") asserts that the legislation transferring the administration of the job incentive program to the Commissioner limited his authority to continuing credits for an otherwise eligible participant in accordance with the terms of the initial approval given by the Job Incentive Board. The Division argues that since the facility for which petitioner seeks credits is not in the location originally approved by the Job Incentive Board, it is not an eligible business facility and is, therefore, not entitled to the credits.

We uphold the determination of the Administrative Law Judge and adopt fully the conclusions of law stated in that determination.

On exception, petitioner had not made any arguments that were not made below. The Administrative Law Judge's determination correctly and adequately analyzes the issues presented by this matter.

To summarize briefly, the Job Incentive Program and the tax credits authorized by that program were repealed by the Legislature in 1983 (L 1983, ch 15, § 57, eff. Apr. 1, 1983). However, the statutory provisions for the Job Incentive Program continued in effect for those taxpayers who had previously received certificates of eligibility for credits from the Job Incentive Board (L 1983, ch 15, § 133). The former State Tax Commission (now the Commissioner of the Department of Taxation and Finance) was authorized to administer the program for these taxpayers (Tax Law § 210[11][h]). Petitioner argues that Tax Law § 210(11)(h) gives the Commissioner the power to "renew, extend, revoke or modify a certificate of eligibility," and that this language means that the Commissioner has the power to determine that petitioner's relocated facility is also eligible for tax credits. A review of the original Job Incentive Program statute and the Tax Law provisions currently applicable to the Commissioner's responsibilities for the

program makes it clear that the Commissioner does not have the power to grant tax credits to a facility in a different location from the one approved by the Job Incentive Board.

The Job Incentive Program statute contained numerous requirements which had to be met for a facility to be eligible for the tax credits (Commerce Law, art 4-A, §§ 115-121). These included being an "eligible business facility" (Commerce Law, art 4-A, § 115[d]), located in an "eligible area," the definition of which included geographic and demographic limitations (Commerce Law, art 4-A, § 115[c]). Entitlement to a certificate of eligibility for tax credits came after the Job Incentive Board had determined that a business facility met all the requirements of the program (Commerce Law, art 4-A, § 120). The entire program is framed in terms of the eligibility of the facility for the credits, not the taxpayer (Commerce Law, art 4-A, § 115-121).

The abolition of the program created additional tax revenue by eliminating the availability of these tax credits to additional facilities. However, since the original program contemplated the renewal of certificates of eligibility for a maximum of ten years (Commerce Law, art 4-A, § 120[c]), the Legislature continued the program, administered by the Commissioner, for those facilities which had previously been granted certificates. However, it is clear that the Legislature did not intend the Commissioner to apply the elaborate and detailed eligibility requirements to determine if new facilities met the requirements of the program as that would obviously be inconsistent with the legislative intent to abolish the program. A taxpayer could continue to receive the credits only for "an eligible business facility" for which an application for credits had previously been approved by the Job Incentive Board "for such facility" (Tax Law § 210[11][a]). Tax Law § 210(11)(h) indicates that the Commissioner has the power to "modify" a certificate of eligibility pursuant to section 120 of the Commerce Law. Under Commerce Law § 120(f), the Job Incentive Board had the power to "modify" a certificate of eligibility if the board determined that the statements contained in the certificate with regard to the training program required by section 118(d), or with regard to whether the facility was an international banking facility were "not in accordance with the facts" (Commerce Law, art 4-A, § 120[f]). Neither of these

circumstances apply to petitioner's situation. The Commissioner cannot have more power to modify a certificate than that given to the Job Incentive Board and, as the Administrative Law Judge stated, the construction urged by petitioner eliminates the specific limitation on the power of the Commissioner stated in Tax Law § 210(11)(a).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sofco, Inc. is denied;
2. The determination of the Administrative Law Judge is upheld;
3. The petition of Sofco, Inc. is denied; and
4. The Commissioner's determination that Sofco, Inc. did not qualify for business facility

tax credits for the fiscal year ended May 31, 1986 is sustained.

DATED: Troy, New York
July 3, 1991

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner