

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>GERALD COHEN</b>	:	<b>DECISION</b>
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1982.	:	

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Petitioner, Gerald Cohen, c/o Lawrence Aviation Industries, Sheep Pasture Road, Port Jefferson Station, New York 11777, filed an exception to the determination of the Administrative Law Judge issued on January 25, 1990 which denied his petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1982 (File No. 804991). Petitioner appeared by Pelletreau & Pelletreau (John J. Hart, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

Neither party submitted a brief on exception. Petitioner's request for oral argument was later withdrawn.

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

***ISSUE***

Whether petitioner, an S corporation shareholder, is entitled to a pass-through of the S corporation's employment incentive tax credit for the year 1982.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

For the year in issue, petitioner, Gerald Cohen, was the 100 percent shareholder of Lawrence Aviation, Inc., a New York State corporation. Lawrence Aviation was an electing Federal subchapter S corporation.

Petitioner timely filed a 1982 New York resident personal income tax return. As a shareholder of an S corporation, petitioner elected to include his pro rata share of the corporation's tax items in calculating his New York resident personal income tax. Included in the items passed through from the corporation to petitioner was an investment tax credit in the amount of \$69,022.00. The credit consisted of two separate parts. The first was a credit of \$22,523.00 provided for by section 210.12 of the Tax Law on property and equipment located in New York State. The second was a credit of \$46,499.00 provided for by section 210.12-A of the Tax Law. It is an additional investment tax credit commonly referred to as the employment incentive tax credit.

On January 28, 1986, the Division of Taxation issued to petitioner a Statement of Audit Changes disallowing the employment incentive tax credit in the amount of \$46,499.00. The statement explained: "There is no provision in Section 606(c) [sic] of the New York State Tax Law for the additional investment tax credit." On May 6, 1986, as a result of the disallowance of the employment incentive tax credit, the Division issued to petitioner a Notice of Deficiency, asserting tax due in the amount of \$46,499.00 plus interest. Petitioner timely protested this notice.

Petitioner timely filed a Claim for Refund of Personal Income Tax for the year 1982. The claim was based in part on the application of a 1985 net operating loss to the year 1982 and in part on petitioner's claim for the additional employment incentive tax credit of \$46,499.00. The Division allowed the application of the net operating loss while denying the employment incentive tax credit. As a result, the Notice of Deficiency issued on May 6, 1986 was canceled and a refund in the amount of \$11,154.85 was authorized and paid. Petitioner timely protested the denial of the remainder of his refund claim.

The only issue in this proceeding is whether petitioner was entitled to the employment incentive tax credit in the amount of \$46,499.00.

***OPINION***

In the determination below, the Administrative Law Judge found that petitioner was not entitled to a pass-through of his S corporation's employment incentive tax credit for the year 1982. The Administrative Law Judge held that the statute upon which petitioner relied to apply the credit was not effective until the tax years beginning after December 31, 1982 and that there was no other provision in the Tax Law which allowed the pass-through of this credit.

On exception, petitioner concedes that the statute upon which he relied in taking the credit was not effective until tax year 1983. He argues, however, that section 606(a) of the Tax Law entitled him to the Tax Law section 606(a) credit in 1982. Petitioner argues that:

"Tax Law Section 606(a) which was applicable to the tax year at question and makes no specific reference to either:

A) The credit for investment in production facilities - allowed by Section 210, subsection 12(a) the pass-thru of which has been allowed; and

B) The employment incentive tax credit - allowed by Section 210, subsection 12A(a) - pass-thru of which has been disallowed. This additional credit is only allowed where the credit for investment in production facilities is allowed." (Petitioner's exception)

Petitioner's argument concludes with the idea that the investment tax credit and the employment incentive credit comprise one investment tax credit and they cannot be separated when applied as a pass-through credit on his tax return.

The Division, relying on its post hearing memorandum, argues that the employment incentive tax credit specifically enumerated in Tax Law § 210.12-A was not referred to in former Tax Law § 606(a), nor did § 606(a) include a comparable employment incentive credit which petitioner could pass through his personal income tax. In addition, the Division argues that since the employment incentive tax credit was not given to partnerships and since S corporations are treated similarly to partnerships, petitioner is not entitled to the tax credit.

We affirm the determination of the Administrative Law Judge.

Pursuant to Tax Law section 660(a), the shareholders of a corporation which is an S corporation for Federal income tax purposes and which is otherwise subject to tax under Article 9-A may elect to have the corporation treated as an S corporation for New York tax purposes. If such election is made, the S corporation is not subject to the Article 9-A tax and the corporation's items of income, loss and deduction flow through to the shareholders for New York income tax purposes (Tax Law §§ 660[a] and 209[8]).

Section 606(a)(2) of the Tax Law provides for a credit, the investment tax credit, against personal income tax with respect to tangible personal property and other tangible property fulfilling certain specified criteria. For 1982, the year at issue, the personal income investment tax credit was specifically allowed to S corporation shareholders by former section 606(a)(9) of the Tax Law which stated in pertinent part:

"in the case of a shareholder of a corporation which is an electing small business corporation for federal income tax purposes, where the election provided for in section six hundred sixty of this article has been made, the credit allowed under this subsection shall be allowed to such shareholder with respect to property described in paragraph two of this subsection which was acquired by such corporation."

The section 606(a)(2) credit is substantially the same as that provided against the corporation franchise tax by section 210.12(b) of the Tax Law. A corporation franchise taxpayer which qualifies for the section 210.12(b) credit may also qualify for the credit provided for by section 210.12-A of the Tax Law, the employment incentive tax credit.

Contrary to petitioner's assertion, section 606(a) of the Tax Law specifically (at subdivision [9]) allowed the investment tax credit to flow through to a subchapter S shareholder for the year at issue. However, section 606(a) contained no similar flow through provision for the employment incentive tax credit, nor any indication that the employment incentive tax credit was available as a credit against personal income tax for a subchapter S shareholder.

The burden of proving entitlement to a credit is upon the taxpayer and in meeting this burden the statute will be strictly construed against the taxpayer (see, General Mills Restaurant

Group v. Chu, 125 AD2d 762, 509 NYS2d 184). Having submitting nothing but his interpretation of former section 606(a), petitioner has failed to sustain his burden of proof.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Gerald Cohen is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Gerald Cohen is denied; and
4. The Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York  
October 11, 1990

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

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

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