STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EVAN AND HELENE PANTELOPOULOS	:	DECISION DTA NO. 809013
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1986, 1987 and 1988.	:	

Petitioners Evan and Helene Pantelopoulos, 32 Cochran Hill Road, Poughkeepsie, New York 12603, filed an exception to the determination of the Administrative Law Judge issued on February 18, 1993. Petitioners appeared by Nicholas Pantelopoulos, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition to the exception. Any reply brief submitted by petitioners was due on June 7, 1993, which date began the six month time period for issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners, owners of a "Dunkin Donuts" franchise, have established entitlement to investment tax credit under Tax Law § 606(a)(2) with respect to certain equipment used in petitioners' business to make donuts and other baked goods.

FINDINGS OF FACT

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

Petitioner Evan Pantelopoulos was the sole shareholder of Golden Hue Manufacturing, Inc., an S corporation.[1] On their joint New York State personal income tax returns for the years at issue petitioners Evan and Helene Pantelopoulos claimed investment tax credits in respect of the S corporation as follows:

Year	Credit Claimed
1986	$2,620.42
1987	3,895.56
1988	1,918.00
Total	$8,433.98

On April 20, 1990,[2] the Division of Taxation ("Division") issued to petitioners a Notice of Deficiency which asserted additional personal income tax due of $8,433.98, plus interest of $1,536.35, for a total amount due of $9,970.33 for the years 1986 through 1988.

By statements of audit changes dated December 18, 1989, the Division explained that the asserted deficiency resulted from the disallowance of claimed investment tax credits. The statements advised that the basis of this disallowance was that the "principal business activity of Golden Hue Manufacturing, Inc.", petitioners' S corporation, was "the retail sale of foods and not manufacturing".

Golden Hue Manufacturing, Inc. operated a "Dunkin Donuts" franchise. The equipment upon which the credit herein was claimed was primarily used to make donuts, but also made pastries, croissants and other baked goods. Specifically, the equipment consisted of proofers which provide humidity and temperature control for the raising of dough; mixers which mix the ingredients; ovens and "fryolators" to bake and fry the ingredients; a rolling machine to shape the dough; a filling machine to fill the donuts and pastries with ingredients; and a cutting

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[1] Although not expressly set forth in the record, it appears that petitioner made a subchapter S election pursuant to Tax Law § 660.

[2] It is noted that petitioners consented to the extension of the limitations period for 1986 to October 15, 1990.

machine to cut the shape of the dough. In sum, the equipment was used to transform dough, water and other ingredients into donuts, pastries, croissants and other baked goods.

Petitioners' "Dunkin Donuts" store consisted of a sales area, which had four tables with chairs for in-store consumption. Behind the sales area was a preparation area where the equipment at issue was located and where the donuts and other baked goods were prepared. The premises also had a small storage area. Most of petitioners' sales were "to go", i.e., for off-premises consumption. The store sold donuts and other baked goods and also coffee and soft drinks. Petitioners estimated that about 95% of sales were "to go". Petitioners also estimated that, while most of their sales were made to individual customers at the store, about 10 to 20% of sales were delivered to, or picked up by, restaurants, delis and catering operations, who, in turn, made sales to customers.

OPINION

The Administrative Law Judge determined that:

> "The investment credit language of Tax Law § 606 (providing credit under the personal income tax) is nearly identical to the investment credit language of Tax Law § 210.12 (providing credit under the corporation franchise tax), and it is appropriate to seek guidance in construing section 606 from decisions construing section 210.12. In General Mills Restaurant Group v. Chu (125 AD2d 762, 509 NYS2d 184), the Appellate Division denied the availability of the investment tax credit provided under Tax Law § 210.12 upon equipment used in the processing of food in retail restaurants. The Court (citing 1969 NY Legis Ann at 447-449, 2576-2577) recognized the purpose behind the enactment of the investment credit provisions was to 'stimulate revitalization of production facilities within [New York State]', and that 'the term "processing" speaks to an industrial activity related to manufacturing' (emphasis added). The Court upheld as valid a 'distinction between the supplier of products and local retailers', and concluded that 'the preparation of food by a restaurant is not considered processing in an industrial sense' (id., 509 NYS2d at 186)" (Determination, conclusion of law "C").

The Administrative Law Judge dismissed petitioners' argument that the "Dunkin Donuts" franchise was a "mini-factory producing baked goods in bulk" and concluded that petitioners' business was clearly a "local retail operation and the machines in question were used in the preparation of food for retail sale" (Determination, conclusion of law "D").

The Administrative Law Judge then held that petitioners' use of their equipment was not a use contemplated to be covered by the investment tax credit (relying on Matter of General Mills Rest. Group v. Chu, 125 AD2d 762, 509 NYS2d 184; Matter of JTR Specialties, State Tax Commn., March 13, 1987; Matter of Pavone, Inc., State Tax Commn., September 15, 1986).

On exception, petitioners assert that the case relied upon by the Administrative Law Judge to deny the investment tax credit to petitioners (Matter of General Mills Rest. Group v. Chu, supra) is factually distinguishable from the present case. Petitioners state that the General Mills case involved food already prepared that was delivered to Red Lobster restaurants and simply had to be "produced for serving"; as opposed to the petitioners' operations where the donuts and other products were produced or manufactured on-site. Petitioners specifically object to the use of the word preparation in the Administrative Law Judge's findings of fact and urge that the word production be used instead.

Petitioners also assert that since General Mills is factually distinguishable from the present case, Tax Law § 606 and § 210(12) should produce the same result when applied to their business as Tax Law § 1115(c) which contains similar language. Petitioners state that "[t]he State of New York has granted exemption under Tax Law § 1115(c) to bakeries of all kinds and specifically to the Dunkin Donuts franchise owned by the party taking exception herein. The State has determined that the equipment of the party taking exception at their Dunkin Donuts franchise is manufacturing equipment and thus utilities used to power such equipment is exempt from sales tax" (Exception, p. 2).

The Division of Taxation asserts that petitioners have misunderstood the General Mills decision in that such decision was not based upon the "type of food preparation." The Division asserts that General Mills was based upon the principle that local retailers are not entitled to an investment tax credit while suppliers of products are, because the intention of the investment tax credit was to attract businesses that did not depend on location for their livelihood.

The Division also asserts that the exemption from tax under Tax Law § 1115(c), mentioned by petitioners for the first time on exception, is an exemption under the sales tax law and not a

credit to tax under Articles 9-A or 22. Therefore, the Division should not be estopped from applying the correct law in this case merely because petitioners have not been denied an exemption under the sales tax law. The Division states that "The weakness of this argument is obvious and entreats the Tribunal to ignore both the determination of the Division of Taxation in this matter and the relevant case law" (Brief in Opposition, p. 3).

We affirm the determination of the Administrative Law Judge.

The petitioners are claiming an investment tax credit under Tax Law § 606(a)(2) for certain equipment used in their "Dunkin Donuts" franchise business. Tax Law § 606(a)(2) allows this credit to be claimed for equipment purchased that is "principally used by the taxpayer in the production of goods by manufacturing, processing ...." The other requirements for this credit are not at issue. The regulations define "principally used" as "more than 50 percent" (20 NYCRR 106.1[d][3]). Put simply, petitioners are arguing that they process raw materials into goods by producing donuts and other pastries to be sold in bulk and that their business is not a restaurant or take-out restaurant preparing food in individual servings.

In applying section 210(12) of the Tax Law, which is the investment tax credit allowed to corporations, in the General Mills case the Appellate Division affirmed the reasoning of the former State Tax Commission that the term "processing" speaks to an industrial activity related to manufacturing. The court stated that:

> "Under this construction, food processing is not categorically excluded, for businesses which process foods for distribution through wholesalers and supermarkets may qualify for the credit. In essence, the Tax Commission has drawn a distinction between the supplier of products and local retailers to promote the statutory objective of attracting and retaining businesses not dependent on locale for their existence. Since restaurants of necessity are dependent on locality to service their clientele, the preparation of food by a restaurant is not considered processing in an industrial sense. The distinction is not unreasonable" (Matter of General Mills Rest. Group v. Chu, supra, 509 NYS2d 184, 186)

The Administrative Law Judge was correct in his application of General Mills to the facts in this case. This Tribunal has held that it is appropriate to look at § 210(12) for guidance when construing § 606(a)(2) (see, Matter of BT Capital Corp., Tax Appeals Tribunal, September 14,

1992). The income tax provision simply allows subchapter S taxpayers the same investment tax credit as corporations under Article 9-A of the Tax Law. Furthermore, petitioners seem to have missed the emphasis in General Mills. While addressing the issue in terms of restaurants, the Court emphasized the type of business (i.e., whether the business was wholesale or a retail business and, therefore, more dependent upon its locale) and not whether the food was sold in individual servings as opposed to food sold in bulk. However, even assuming that there is merit to petitioners' argument that the Court was focusing on the fact that the taxpayer in General Mills conducted a restaurant business, petitioners have not produced any evidence, documentary or testimonial, that would allow us to factually determine that petitioners "produce foods sold in bulk (rather than in individual servings) at retail." Indeed, the minimal record below indicates that petitioners have four tables with chairs in their building for purposes of in-store consumption. This fact alone indicates that some portion of petitioners' business is the retail sale of restaurant food.

The same conclusion is reached with regard to petitioners' argument, raised for the first time on exception, that the Division's policy of granting exemptions to "Dunkin Donuts" franchises for sales tax purposes on purchases of utilities used in producing baked goods requires the Division to apply the same policy in this case. Other than the mere assertion that they have not been denied a sales tax exemption and, therefore, should not be denied an investment tax credit under section 606 of the Tax Law, petitioners have not put forth any cogent legal argument or compelling factual circumstances that would cause us to ignore the case law construing section 210(12) of the Tax Law.

Finally, petitioners' objection to the use of the word preparation in the Administrative Law Judge's determination instead of production is superfluous. It is the substance of the record before the Tribunal that produces the conclusion petitioners are not entitled to the investment tax credit, not the use of the word preparation by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Evan and Helene Pantelopoulos is denied;

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

3. The petition of Evan and Helene Pantelopoulos is denied; and

4. The Notice of Deficiency dated April 20, 1990 is sustained.

DATED: Troy, New York
December 2, 1993

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

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