STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
3M CARTING, INC.	:	DECISION DTA No. 810321
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended August 31, 1982 and July 31, 1984.	:	

Petitioner 3M Carting, Inc., 311 Winding Road, Old Bethpage, New York 11804, filed an exception to the determination of the Administrative Law Judge issued on September 23, 1993. Petitioner appeared by Milton Shaiman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition to the exception. Any reply brief was due by December 14, 1993, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation's denial of petitioner's claim for investment credit was proper.

FINDINGS OF FACT

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

Petitioner, 3M Carting, Inc., is a corporation organized and incorporated under the laws of the State of New York. Petitioner began doing business in New York State in August 1967.

For its fiscal years ended August 31, 1982 and July 31, 1984, petitioner filed a State of New York Corporation Franchise Tax Report (Form CT-3 for the FYE 8/31/82 and Form CT-4 for the FYE 7/31/84, respectively). On its Form CT-3, petitioner listed its principal business activity as "rubbish recycling". On its Form CT-4, petitioner listed its principal business activity as "rubbish removal".

As gleaned from investment credit schedules attached to each of the above-described reports, petitioner claimed investment credits in the respective amounts of $2,428.01 with respect to its fiscal year ended August 31, 1982, and $6,955.69 with respect to its fiscal year ended July 31, 1984. Information from these investment credit schedules, as well as from depreciation schedules included as part of petitioner's U.S. Corporation Income Tax Return (Form 1120) for each of the respective fiscal years, reveals that the claimed investment credit relates to the acquisition of two vehicles described respectively as a "20-yard packer vehicle" and a "15-yard packer vehicle". The schedules list respective acquisition dates of September 1981 and September 1983 for the vehicles, a useful life of seven years for each, a principal use listing of "recycle rubbish", and respective cost figures of $117,193.00 (for the 20-yard packer) and $82,084.00 (for the 15-yard packer). The depreciation schedules noted herein refer to these vehicles in each instance as "a truck".

Petitioner used the claimed investment credits as reductions against its franchise tax liability for each of the periods in question. However, the Division of Taxation ("Division") disallowed the claimed credits and issued notices to petitioner asserting tax and interest due for the fiscal year ended August 31, 1982, and tax, penalty and interest due for the fiscal year ended July 31, 1984. In turn, petitioner eventually paid the tax asserted as due for each of these years. More specifically, on August 17, 1987, petitioner paid in full the $3,755.00 amount (tax plus interest) asserted as due for the fiscal year ended August 31, 1982, and on May 18, 1989, petitioner paid in full the $9,482.72 amount (tax plus penalty and interest) asserted as due for the fiscal year ended July 31, 1984.

On December 18, 1990, the Division received from petitioner a separate Claim for Credit or Refund of Corporation Tax Paid (Form CT-8) for each of the fiscal years at issue seeking refunds equal to the above amounts paid. The refund claims are each dated as signed on December 12, 1990, and bear an indate stamp indicating receipt by the Division on December 18, 1990. A photocopy of the envelope in which the refund claims were mailed bears a United States Postal Service postmark date of December 13, 1990. Each refund claim is premised upon the contention that the Division erroneously disallowed petitioner's claims for investment credit.

By a letter dated February 6, 1991, the Division denied each of petitioner's claims for refund.

Petitioner's position, as set forth in its affirmation in reply, is as follows:

> "The rubbish industry is controlled very strictly by the towns and the Department of Environmental Control. With the advent of the closing of landfill operations by the towns on Long Island, the nature of the collection of garbage changed to one of the beginning process of the manufacture of paper, wallboard, glass, aluminum sheets and steel.
>
> "3M Carting, Inc. was forced to buy this new equipment to accommodate the recycling program. The carter now picks up specialized loads, extracts from these materials, as is done in a mining operation, paper, cardboard, aluminum, steel, glass and other materials for recycling. The material is stored after it is sorted and packed by the machinery then shipped for further processing and manufacture."

In opposition to petitioner's position, the Division first argues that the refund claim for petitioner's fiscal year ended August 31, 1982 was not timely filed and must on that basis alone be denied. The Division goes on to argue, as to the merits, that petitioner has failed to establish that the machinery or equipment in question qualifies for the investment credit pursuant to Tax Law § 210.12(b) and 20 NYCRR 5-2.2. More specifically, the Division maintains that petitioner has not provided sufficient evidence that the equipment itself meets the criteria established for equipment on which an investment credit may be claimed, nor has petitioner established that the equipment in question was used so as to produce goods by processing, manufacturing, etc., as called for under the Tax Law.

As part of its July 27, 1993 submission, petitioner included a copy of a "Payment Document", dated August 10, 1985. This document was issued by the Division to petitioner seeking payment in an amount equal to the disallowed investment credit ($6,955.69) for the fiscal year ended July 31, 1984, plus penalty and interest. The lower portion of this document includes a section headed with the instruction "IF YOU DISAGREE WITH THE ABOVE ASSESSMENT, PLEASE CHECK APPROPRIATE BOX AND ENCLOSE DOCUMENTATION." None of the boxes appearing immediately below this heading are "checked", including the box labeled "refund requested", nor is there any indication of disagreement by petitioner appearing elsewhere on this document. In addition, petitioner submitted a photocopy of an unsigned handwritten statement, under the letterhead of the Chicago Title Insurance Company, providing as follows:

"

Sent
10/26/85

Dear Sirs,

We have protested this before. We have sent proof to you in regard to the money you say we owe. We have sent you letters prior to this one and the only response we get are assessment notices. Please check your files."

Finally, petitioner submitted a copy of its 1983 Form 1120 in support of its claim that the equipment in question qualified as property upon which investment credit is available.

In response to petitioner's submissions, the Division asserts that none of the above-described documents constitutes a claim for refund, and that petitioner's Federal return, on which a depreciation deduction is claimed, alone is not proof that the subject equipment qualifies for investment credit.

OPINION

The Administrative Law Judge found that petitioner's refund claim for the fiscal year ending August 31, 1982 was not timely filed. It was received by the Division on December 18, 1990 and had a United States Postal Service postmark of December 13, 1990. As neither of these dates falls within two years from the date the tax was paid (see, Tax Law § 1087[a]), the refund claim was not timely. In addition, the Administrative Law Judge found that the payment

document and handwritten note are not refund claims because they are both dated prior to the payment of the tax. Further, the Administrative Law Judge found that the handwritten note bore no relationship to this matter and that the payment document related to the fiscal year ending July 31, 1984.

With respect to the refund claim for the fiscal year ending July 31, 1984, the Administrative Law Judge determined from the evidence submitted that petitioner was not entitled to claim the investment tax credit in Tax Law § 210(12)(b). The Administrative Law Judge found that petitioner's sorting of recyclable items did not involve the processing of the items into new shapes or constitute the production of goods. The Administrative Law Judge stated that petitioner merely "sorted various recyclable items into categories, which items were then turned over to others for subsequent processing, manufacturing, etc." (Determination, conclusion of law "C"). In view of the above, the Administrative Law Judge found it unecessary to decide whether the equipment met the other qualifications set forth in Tax Law § 210(12)(b).

On exception, petitioner continues to argue that it is entitled to the investment tax credit. Petitioner contends that it:

> "performs the initial stages of manufacturing by mining the raw materials, packaging and storing them before shipping them to the mill for the next stage in manufacture. The metal is compressed into new shapes, the other raw materials are also processed by our machinery. Storage is also part of our operation" (Petitioner's exception, p. 1).

Petitioner further asserts that the regulations provide that mining and storage are part of the manufacturing process. Finally, petitioner states that any ambiguities should be resolved in its favor.

In response, the Division asserts that petitioner's refund claim for the fiscal year ended August 31, 1982 was not timely filed.

The Division further argues that assessments carry with them a presumption of correctness, that the burden of proof is on petitioner to show that the assessment is in error and that petitioner has not met this burden.

In addition, the Division argues that petitioner has not shown that the machinery in question meets the requirements of Tax Law § 210(12)(b). In particular, the Division argues, petitioner has not shown that the equipment was used in the production of goods or that it was used more than 50% of the time in such production. The Division, further argues that "at best, petitioner merely collected and sorted recyclable containers and other items, which activities do not constitute 'production'" (Division's brief, p. 9).

The Division contends that petitioner has presented no evidence to support the allegations made in its exception that it engages in manufacturing by mining the raw materials, or that it compresses the metal into new shapes, processes the other raw materials and provides storage.

With respect to petitioner's assertion in its exception that any ambiguities should be resolved in its favor, the Division argues that petitioner has not pointed out any ambiguities in the statute. In addition, the Division asserts that when statutes grant either an exemption or credit, the burden is on petitioner to show "that it clearly falls within the provisions of the credit-granting statute" (Division's brief, p. 16). The Division, relying on Blue Spruce Farms v. State Tax Commn. (99 AD2d 867, affd 64 NY2d 682), states that "[i]f there is any doubt or ambiguity, the statute involved must be strictly and narrowly construed against the taxpayer" (Division's brief, p. 17).

In its exception, petitioner claims that the equipment "compresses" the metal into new shapes and that the other materials are also processed, but petitioner put no evidence as to the function of the equipment in the record. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 3M Carting, Inc. is denied;

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

3. The petition of 3M Carting, Inc. is denied; and

4. The Division of Taxation's denial of petitioner's refund claims is sustained.

DATED: Troy, New York
May 19, 1994

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

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