

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
CANADIAN IMPERIAL BANK OF COMMERCE, CANADIAN IMPERIAL BANK OF COMMERCE - NEW YORK AND CANADIAN IMPERIAL HOLDINGS, INC.	:	DECISION DTA NOS. 810520, 810521, 811924 and 811925
for Redetermination of Deficiencies or for Refund of Franchise Tax on Banking Corporations under Article 32 of the Tax Law for the Fiscal Years Ended October 31, 1989 and October 31, 1990.	:	

Petitioners Canadian Imperial Bank of Commerce, Canadian Imperial Bank of Commerce - New York and Canadian Imperial Holdings, Inc., 425 Lexington Avenue, New York, New York 10017, filed an exception to the determination of the Administrative Law Judge issued on August 5, 1993. Petitioners appeared by Sullivan & Cromwell (Andrew S. Mason and Sarah R. Katz, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel).

Petitioners filed a brief on exception, the Division of Taxation filed a brief in opposition, and petitioners filed a brief in reply. Oral argument was heard on April 21, 1994, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioners are entitled to the eligible business facility tax credit for a newly-located facility that was a successor to facilities which had received initial approval from the Job Incentive Board.

FINDINGS OF FACT

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

1. The parties entered into an agreement, dated October 29, 1992, stipulating to the facts in this case. The stipulated facts have been adopted as Findings of Fact "2" through "36." Findings of Fact "29" and "37" through "39" contain additional findings of fact.¹

2. Prior to 1981, Canadian Imperial Bank of Commerce, a commercial bank organized under the laws of Canada ("CIBC"), managed its United States operations from its headquarters office in Toronto, Ontario.

3. In 1981, as part of an effort to expand its business in the United States, CIBC decided to establish a United States headquarters office (the "U.S. Operating Office") for the purpose of managing its existing U.S. operations and overseeing the expansion of its business in the United States.

4. At the time of its decision to establish the U.S. Operating Office, CIBC had existing operations in California, Georgia, Illinois, Pennsylvania, Washington, Oregon and New York.

5. CIBC considered several alternative locations as the situs of the U.S. Operating Office, but ultimately selected New York City, where CIBC's wholly-owned subsidiary, Canadian Imperial Bank of Commerce Trust Company (later renamed Canadian Imperial Bank of Commerce [New York] ["CIBC-NY," and, together with CIBC, "petitioners"]), had been operating since 1951.

6. A material factor in CIBC's decision to establish the U.S. Operating Office in New York, rather than in any of the other states where CIBC had operations at the time, was the availability of the eligible business facility ("EBF") tax credit under Article 32 of the Tax Law to commercial banks that chose to locate and expand in "eligible areas" in New York.

¹We have deleted additional findings of fact "40" and "41," Summary of Parties Position, as not relevant in light of the parties' articulated position on the exception to the Administrative Law Judge's determination.

7. On March 30, 1982, petitioners submitted a joint application, prepared on a consolidated basis, to the New York State Job Incentive Board ("JIB") for initial approval for EBF tax credits with respect to their operations at three locations in New York City: 237 Park Avenue, 245 Park Avenue and 20 Exchange Place/22 William Street (the "Original Facilities").

8. On April 29, 1983, at the request of the JIB, petitioners submitted revised applications, prepared on a separate company basis, for approval for EBF tax credits with respect to their operations at the Original Facilities.

9. In submitting their revised applications for EBF tax credits, petitioners wrote the following to the JIB:

"Commercial banks located in New York City are subject to the highest tax rates for any business taxpayer in the country. From 1975 to the present, the combined rate has exceeded 25% of taxable income (current State and City tax rates are 14.16% and 13.823%, respectively). As a result, incentives such as the franchise tax credits granted by the Job Incentive Board are necessary to encourage banks such as Canadian Imperial to locate in New York

"Canadian Imperial Bank previously managed its United States operations from its headquarters in Toronto. Recently a decision was made to relocate the management to the United States in conjunction with a major effort that was being undertaken to expand the Bank's business in the United States. New York City was selected as the location of this new management group over our other branch locations in California, Illinois, Pennsylvania, Washington and Oregon. As a result of our expansion, it is anticipated that we will increase our employment in New York by approximately 50% in the aggregate to 300 personnel."

10. In June 1983, the JIB granted initial approval to petitioners for EBF tax credits with respect to their operations at the Original Facilities.

11. CIBC-NY first began claiming EBF tax credits in its fiscal year ended October 31, 1983. In each fiscal year through October 31, 1988, CIBC-NY claimed EBF tax credits on the basis of renewed certificates or eligibility with respect to its operations at the Original Facilities as follows:

<u>Fiscal Year</u>	<u>JIB No.</u>	<u>Affidavit of Compliance Filed</u>	<u>Certificate Received</u>
10/31/83	185-01	6/29/84	8/24/84
10/31/84	185-02	6/21/85	7/26/85
10/31/85	185-03	7/03/86	8/14/86
10/31/86	185-04	9/10/87 (Revised 9/17/87)	2/19/88

10/31/87	185-05	7/15/88 (Revised 8/25/88)	8/09/88 9/14/88 (Rev)
10/31/88	185-06	9/08/89	9/21/89

12. CIBC first began claiming EBF tax credits in its fiscal year ended October 31, 1984. In each fiscal year through October 31, 1988, CIBC claimed EBF tax credits on the basis of renewed certificates of eligibility with respect to its operations at the Original Facilities as follows:

<u>Fiscal Year</u>	<u>JIB No.</u>	<u>Affidavit of Compliance Filed</u>	<u>Certificate Received</u>
10/31/84	234-01	6/21/85	7/31/85
10/31/85	234-02	6/30/86	8/14/86
10/31/86	234-03	9/04/87 (Revised 9/17/87)	1/11/88
10/31/87	234-04	7/15/88	9/14/88
10/31/88	234-05	9/14/89	9/27/89

13. Between 1981 and 1988, the total number of CIBC-NY employees at the Original Facilities increased from 30 to 106, representing a net increase of 76 jobs over the number of jobs reported on its original application to the JIB.

14. Between 1981 and 1988, the total number of CIBC employees at the Original Facilities increased from 174 to 406, representing a net increase of 232 jobs over the number of jobs reported on its original application to the JIB.

15. By 1988, petitioners had together created over 300 new jobs at the Original Facilities, or three times the number of jobs petitioners predicted they would create when they first applied to the JIB for EBF tax credits.

16. To accommodate the substantial number of jobs created during this period, petitioners more than doubled the total office space they occupied at the Original Facilities, with most of the expansion occurring at the Park Avenue locations. By 1988, the total square footage occupied by petitioners at the Original Facilities stood at 135,127, compared to 63,864 square feet in March 1982, the time of their original application to the JIB.

17. Despite the considerable expansion undertaken by petitioners at the Original Facilities, the increase in employment levels far exceeded the available space at the Original Facilities, and, by 1987, petitioners faced an acute shortage of space. The facility at 237 Park

Avenue, where petitioners occupied approximately two floors, was already fully occupied and no further space was available. Although petitioners were able to obtain certain additional blocks of space at 245 Park Avenue, the space was not contiguous with petitioners' existing office space at that location and was highly undesirable due to the fact that large sections of the building were undergoing asbestos removal. Petitioners could not expand at the 20 Exchange Place/22 William Street location because it was already fully occupied. Moreover, due to antiquated support systems and technologically obsolete wiring, the 20 Exchange Place/22 William Street location was not structurally amenable to necessary upgrading and enhancement of computer and data processing facilities.

18. Despite petitioners' efforts to provide an effective and productive work environment for their employees, the crowded conditions at the Original Facilities placed significant burdens on petitioners' operations and employees.

19. In order to maximize available work space at the Original Facilities, petitioners were required to convert file rooms, conference rooms and even a portion of the employee cafeteria into makeshift offices. Despite these measures, however, some employees had to be stationed in rows of desks set up in hallways.

20. Petitioners encountered particular hardship at the 245 Park Avenue location, where the lack of contiguous space, makeshift accommodations and crowded conditions so overburdened existing telephone capacity that petitioners were forced to make a substantial investment in a new telephone switch in order to provide adequate communications coverage. In addition, petitioners were effectively precluded from making any structural or physical improvements to their office space at that location because any such improvements would have entailed costly asbestos removal and would have required the temporary transfer of employees to yet another location.

21. As a possible solution to the space problem at the Original Facilities, petitioners' landlord at the Park Avenue locations offered petitioners alternative office space that an affiliate was completing at a nearby location. This office space, located at 425 Lexington Avenue (the

"Lexington Avenue Premises"), offered more than 235,000 square feet of contiguous office space, which was nearly 100,000 square feet more than the space available to petitioners at the Original Facilities.

22. After some deliberation, petitioners eventually decided to accept their landlord's offer to move to the Lexington Avenue Premises because this not only offered a solution to the current space problem but also would allow further expansion of petitioners' operations according to industry conditions. Because employment levels at the Original Facilities already far exceeded the capacity of the Original Facilities, the Original Facilities could not accommodate any further growth.

23. In late 1988, petitioners transferred all of their operations and employees to the Lexington Avenue Premises.

24. The Lexington Avenue Premises are located in the borough of Manhattan in the City of New York, the same eligible area in which the Original Facilities were located.

25. As of October 31, 1989, after giving effect to the relocation, the Lexington Avenue Premises houses 369 employees of CIBC and 99 employees of CIBC-NY, representing a net increase of 195 jobs and 69 jobs, respectively, over CIBC's and CIBC-NY's original applications to the JIB.

26. As of October 31, 1990, the Lexington Avenue Premises housed 398 employees of CIBC and 50 employees of CIBC-NY, representing a net increase of 224 jobs and 20 jobs, respectively, over CIBC's and CIBC-NY's original applications to the JIB.

27. Throughout fiscal 1989 and 1990, numerous job training programs were offered for the employees of CIBC and CIBC-NY at the Lexington Avenue Premises, including educational and training seminars on value planning, restructuring and special industry issues, consulting, negotiating and selling strategies, computer and word processing skills, and teamwork and communications skills.

28. On August 21, 1990, petitioners each submitted an Affidavit of Compliance for a Certificate of Eligibility of EBF tax credits for the fiscal year ended October 31, 1989 (the "1989 fiscal year").

29. By letters dated September 10, 1990, the New York State Division of Taxation (the "Division") denied petitioners' requests for EBF tax credits on the grounds that "the location 425 Lexington Avenue, New York, New York, was not an approved facility." The letter further related the following:

"Section 210(11)(h) of the New York State Tax Law empowered the State Tax Commission on or after April 1, 1983 to issue a Certificate of Eligibility for tax credits to a taxpayer for an eligible business facility (place of business) with regard to which such taxpayer has prior to July 1, 1983 received from the New York State Job Incentive Board initial approval of an application for such certificate by such Board as evidenced by the minutes of the meeting of the Board at which such application was approved."

30. On October 12, 1990, petitioners requested a joint conference before the Bureau of Conciliation and Mediation Services to contest the Division's denial of their request for EBF tax credits for the 1989 fiscal year.

31. On October 15, 1990, petitioners filed their tax returns for the 1989 fiscal year. CIBC claimed an EBF tax credit of \$416,260.00 and CIBC-NY claimed an EBF tax credit of \$3,556,132.00 for the 1989 fiscal year. Each of the petitioners disclosed in its tax return that the Division had denied its request for EBF tax credits for the 1989 fiscal year and that it was contesting such denial.

32. On August 7, 1991, a conciliation conference was conducted by Sareve Dukat, Conciliation Conferee, at the offices of the Bureau of Conciliation and Mediation Services, Brooklyn, New York.

33. On September 17, 1991, petitioners each submitted an Affidavit of Compliance for a Certificate of Eligibility for EBF tax credits for the fiscal year ended October 31, 1990 (the "1990 fiscal year").

34. By letters dated September 30, 1991 and October 1, 1991, respectively, the Division again notified CIBC-NY and CIBC that it would not grant their requests for EBF tax credits because the location at 425 Lexington Avenue was not an approved facility.

35. On October 15, 1991, petitioners filed their tax returns for the 1990 fiscal year. Petitioners did not claim EBF tax credits for the 1990 fiscal year; however, petitioners stated in their tax returns that they were seeking reinstatement of the EBF tax credit in a proceeding before the Bureau of Conciliation and Mediation Services and that they intended to file refund claims in the event the credit was reinstated.

36. On November 22, 1991, the Bureau of Conciliation and Mediation Services issued a Conciliation Order to each of the petitioners denying their requests for EBF tax credits and upholding the determination of the Division.

37. By petitions dated February 19, 1992 (DTA Nos. 810520 and 810521), petitioners noted that they claimed EBF tax credit for the fiscal year ended October 31, 1989 disclosing at the same time that they intended to contest the denials of their requests to renew their certificates of eligibility. Petitioners further noted that as of the date of the petitions, they had not received their respective notices of deficiency with respect to the 1989 tax year.

38. In its respective answers dated April 13, 1992, the Division asserted that:

"the Commissioner of Taxation has authority to issue Certificates of Eligibility to a petitioner for years at issue only for the facilities covered in its initial application for participation in the JIB."

39. On May 27, 1993, petitioner CIBC filed a petition (DTA No. 811925) and Canadian Imperial Holdings, Inc. filed a petition on behalf of CIBC-NY (DTA No. 811924). Attached to each petition was a Notice of Deficiency dated March 1, 1993. In its petition, Canadian Imperial Holdings, Inc. noted that the Notice of Deficiency addressed to it included a deficiency of \$3,556,132.00 attributable to CIBC-NY's denied certificate of eligibility for the 1989 tax year because it filed a combined return with CIBC-NY. Similarly, CIBC noted in its petition that the Notice of Deficiency addressed to it included the denied EBF tax credit of \$416,260.00 for the 1989 tax year. Both petitioners further noted that CIBC-NY and CIBC already had filed

petitions with respect to the claimed EBF tax credits for the 1989 and 1990 tax years. Both parties stated that the two petitions involve the identical issues that were asserted in the two prior petitions and that the latter petitions were filed to protect their rights.

OPINION

Initially, we review briefly the statutory and administrative framework relevant to the issues in this case.

In 1968, a new Article 4-A was added to the Commerce Law creating the New York State Job Incentive Board which was empowered to grant tax credits under the Tax Law and real property tax exemptions under the Real Property Tax Law to "eligible business facilities." The purpose of the eligible business facility tax credit was:

"to encourage industrial and other business enterprises to locate, expand and improve facilities in economically underprivileged urban areas and to provide job opportunities and job training programs for residents of such areas" (L 1968, ch 1054, § 1).

In the Governor's Memorandum approving the bill, it was stated that:

"[i]n addition to building or expanding in such an urban core area, a business, to be eligible, will be required to add or retain five or more jobs for residents of the area, operate an approved job training program for such residents, and provide continuing job opportunities for such residents" (Governor's Bill Jacket, L 1968, ch 1054).

Section 117 of the Commerce Law empowered the JIB to adopt rules and regulations consistent with the law, to determine and designate eligible areas as defined in section 115(c), to determine if a business facility was an "eligible business facility" as defined in section 118, to issue, modify or revoke certificates of eligibility, and to "actively promote" the use of the statutory provisions "so as to aid and assist business development." Under section 120(b) of the Commerce Law, certificates of eligibility were limited to the tax year or the taxable status date for which issued. The maximum number of years of eligibility was ten years.

The JIB adopted a guideline which, while it did not have the force and effect of rules and regulations, was an interpretive statement which explained the Board's view of the law (see, Leichter v. Barber, 120 AD2d 776, 501 NYS2d 925).

The relevant portion of the guideline, relied upon by petitioners, is:

"a. When a firm relocates and meets the criteria in either Ia or Ib, then all the jobs prior to the move are considered as jobs retained.

"b. If a firm can prove to the satisfaction of the Board that its relocation is necessary to discourage its relocation out-of-State, or to preserve its competitive position in its industry, then all the jobs prior to the project are considered as jobs retained. This provision covers situations which may result in decreased employment" (Petitioners' brief, Exhibit "A.")

In 1983, the Legislature repealed Article 4-A of the Commerce Law and amended the Tax Law authorizing the former State Tax Commission (now the Commissioner of Taxation and Finance [hereinafter referred to as "Tax Commissioner"]) to administer the program for those taxpayers who, prior to July 1, 1983, received from the JIB, initial approval of an application for a certificate of eligibility. The repealing statute provided that for those taxpayers, the provisions of Article 4-A and the provisions of the regulations adopted thereunder were to continue in effect "as if these provisions had not been repealed . . ." (Governor's Bill Jacket, L 1983, ch 15, effective April 1, 1983).

Tax Law § 1456(b)(1) was amended to provide that on or after April 1, 1983, the credit would be allowed only to a taxpayer owning or operating an eligible business facility:

"where such taxpayer has received a certificate of eligibility for tax credits, or a renewal or extension thereof, for such facility from the New York state job incentive board prior to April first, nineteen hundred eighty-three, or has received a certificate of eligibility for tax credits, or a renewal or extension thereof, for such facility from the state tax commission subsequent to such date pursuant to paragraph eight of this subsection, and only with respect to such facility, to be computed as hereinafter provided" (Tax Law § 1456[b][1], emphasis added).

Identical language was added to Tax Law § 210(11)(a) relating to the franchise tax and section 1511(d)(1) relating to the tax on insurance corporations.

Tax Law § 1456(b)(8) empowered the Tax Commissioner, on or after April 1, 1983:

"to issue a certificate of eligibility for tax credits to a taxpayer for an eligible business facility with regard to which such taxpayer has, prior to July first, nineteen hundred eighty-three, received from the New York state job incentive board initial approval of an application for such certificate by such board as evidenced by the minutes of the meeting of the board at which such application was approved . . . and to renew, extend, revoke or modify a certificate of eligibility for tax credits, pursuant to section one hundred twenty of the commerce law as such section existed on March thirty-first, nineteen hundred eighty-three."

In 1988, the Legislature (L 1988, ch 165), amended Tax Law § 210 (the Franchise Tax on Business Corporations); Tax Law § 1456(b)(1) (the Franchise Tax on Banking Corporations) and Tax Law § 1511(d)(1) (the Franchise Tax on Insurance Corporations) to provide that the eligible business facility credits against tax shall be allowed only for taxable years beginning before January 1, 2000. The Legislative Memorandum in support of the bill (1988 McKinney's Session Laws of NY, at 1981-1983) provided the following statement in support of the Bill:

"Chapter 15 of the Laws of 1983 provided for the termination of the Job Incentive Board and was intended to provide for the end of the Job Incentive Program. However, there is nothing in statute which requires taxpayers to begin claiming the credits or the real property tax exemption provided for under that program by any particular time. At present, out of the entire number of taxpayers which have been given initial approval into the program, there are approximately 1,000 taxpayers which have not filed a first affidavit of compliance for a certificate of eligibility for tax credits. Under present law, these taxpayers have the opportunity to file such an affidavit at any time in the future, creating the theoretical possibility of the program's remaining in existence forever despite the Legislature's decision to terminate it. The amendments provided in this bill will end the Job Incentive Program, by means of terminating the availability of both the tax credits and the real property tax exemption, in accordance with that decision. The amendments will allow the Department of Taxation and Finance to plan for the future regarding the administration of its portion of the program and to place a time limit on the maintenance of records for the program. Similar considerations apply to the State Board of Equalization and Assessment" (1988 McKinney's Session Laws of NY, at 1982-1983, emphasis added).

In 1989, the Division promulgated regulations with respect to Tax Law § 1456 and the 1983 changes to the job incentive program (20 NYCRR Appendix 1). The regulations define "eligible business facility" as follows:

"a place of business which meets the requirements of section 118 of the Commerce Law as such section existed on March 31, 1983. It is the business facility at the identical location with regard to which a taxpayer has received initial approval" (20 NYCRR Appendix 1, emphasis added).

The Administrative Law Judge characterized petitioners' position at hearing as follows:

"[p]etitioners contend that the 1989 regulations are inconsistent with the legislative intent underlying the EBF tax credit, are out of harmony with the statute and, in any event, may not be retroactively applied in this case. Petitioners claim that the statutory reference to the date of March 31, 1983 in Tax Law § 1456(b)(8) prohibits the Division from enforcing the "identical location" requirement of the 1989 regulations because such a requirement was not imposed by the statutory provisions in effect on March 31, 1983" (Determination, conclusion of law "C").

The Administrative Law Judge rejected this position and determined that:

"the purpose of the 1989 regulations was to codify the policy underlying the 1983 repeal and phase-out of the JIB and not to codify the policy underlying the initial creation of the JIB in 1968. The Tax Commissioner's authority under Tax Law § 1456(b)(8) must be considered within the entire legislative directive to repeal Article 4-A of the Commerce Law and to authorize the Tax Commissioner under such Tax Law sections as section 1456(b)(8) to phase-out the program. The 1983 amendments to the Tax Law concerning the repeal and phase-out of the JIB were enacted as part of a budget bill, the purpose of which was to address the fiscal concerns of the State's budget (Governor's Bill Jacket, L 1983, ch 15)" (Conclusion of Law "C").

The Administrative Law Judge further determined that:

"[I]miting eligible facilities to those that were initially approved by the JIB is consistent with the phase-out of the program. The [Commissioner's] authority to phase-out -- to renew or revoke certificates -- under section 1456(b)(8) is only with respect to existing participants inasmuch as no new participants were accepted after July 1, 1983. Hence, the [Commissioner] reasonably read his statutory authority under section 1456(b)(8) to renew certificates only for facilities previously approved by the JIB" (Determination, conclusion of law "C").

The Administrative Law Judge went on to opine that this Tribunal's decision in Matter of Sofco, Inc. (Tax Appeals Tribunal, July 3, 1991) is consistent with the regulation, citing to the following passage from our decision:

"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."

The Administrative Law Judge concluded, again quoting our decision, that:

"[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.'"

Finally, the Administrative Law Judge rejected petitioners' assertion that the 1989 regulation may not be applied retroactively to the facts in this case. Citing Securities & Exchange Commn. v. Chenery Corp. (332 US 194) for the principle that "the retroactive application of a regulation must be measured against the policy of the statute it seeks to interpret and the principle of equity," the Administrative Law Judge determined that the 1989 regulation followed the policy underlying the 1983 changes to the JIB which was to end the program and phase-out existing participants.

"Ordinarily, if a new regulation or interpretation merely recites settled prior law or policy, then retroactive application of the regulation or interpretation is proper. If, however, the new regulation or interpretation overrules prior law or policy, the new regulation or interpretation will not, depending on various factors, be given retroactive effect. This distinction is obviously grounded upon notions of fairness to the involved parties' (Sam v. U.S., 682 F2d 925, 932 [Ct Cl 1982], cert denied 459 US 1146, 74 L Ed 2d 993 [1983]).

"As noted above, the 1989 regulation follows the policy underlying the 1983 changes to the JIB which was to end the program and phase-out existing participants. The Tax Commissioner carried out that policy by limiting eligibility on renewal to those facilities that were initially approved by the JIB. As noted in Sofco, the entire framework of the program focused on the facility and not the taxpayer. The 1983 changes allowed those taxpayers who already had JIB approval of eligible facilities to retain tax credits if they continued to meet the requirements in effect on March 31, 1983 -- hence, the reference to the law in effect on March 31, 1983. However, the reference to this date did not mean that the Tax Commissioner must renew a certificate for a new facility if that facility met the requirements under the law in effect on March 31, 1983. Inasmuch as the program primarily targeted facilities and not a taxpayer, a new facility is similar to a new participant which the Legislature clearly intended to eliminate with the repeal and phase-out of the program. Thus, the 1989 regulations reinforce the intended policy underlying Tax Law § 1456(b)(8)" (Determination, conclusion of law "D").

Petitioners' arguments on exception can be summarized as follows: the 1983 legislation was specifically intended to provide for the continuation of credits to taxpayers who owned facilities which the JIB had determined to be eligible facilities prior to March 31, 1983; petitioners had an eligible business facility approved by JIB prior to March 31, 1983; while the statute was silent on the eligibility of relocated or expanded facilities for the tax credits, the JIB guidelines provided that certificates could be renewed or extended for relocated facilities; the relocation of petitioners' business to 425 Lexington Avenue was a "relocation within the JIB guidelines"; these guidelines represented the JIB interpretation of the law as of 1983 and that such interpretation binds the Division; and the 1989 regulation is invalid because it is inconsistent with the law as interpreted by JIB and that, in any event, even if the regulation reflects a proper enactment by the Division, it cannot be applied retroactively. Finally, petitioners assert that the decision in Matter of Sofco, Inc. (supra) is distinguishable from the present situation on its facts and, therefore, is not controlling.

On exception, the Division asserts that the determination of the Administrative Law Judge is correct.

We affirm the determination of the Administrative Law Judge.

The facts here parallel those in Matter of Sofco, Inc. (*supra*), in that petitioners are seeking eligibility for a new facility, 425 Lexington Avenue. While Sofco dealt with the credit under the franchise tax, we find it dispositive here since the relevant language, i.e., Tax Law § 1456(b)(1), is identical to section 210(11)(a), the basis of our decision in Sofco. In short, the Commissioner, under the transition language, has the authority to deal only with "such facilities" as received initial approval by JIB. As we stated:

"[t]he entire [JIB] 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]). . . . [T]he construction urged by petitioner eliminates the specific limitation on the power of the Commissioner stated in Tax Law § 210(11)(a)" (Matter of Sofco, Inc., *supra*, emphasis added).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Canadian Imperial Bank of Commerce, Canadian Imperial Bank of Commerce - New York and Canadian Imperial Holdings, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Canadian Imperial Bank of Commerce, Canadian Imperial Bank of Commerce - New York and Canadian Imperial Holdings, Inc. are denied; and

4. The notices of deficiency dated March 1, 1993 are sustained.

DATED: Troy, New York
October 13, 1994

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner