

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

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

---

Petitioner, Gerald Cohen, c/o Lawrence Aviation Industries, Sheep Pasture Road, Port Jefferson Station, New York 11777, filed a 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).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on September 12, 1989 at 1:15 P.M., with all briefs to be submitted by November 20, 1989. 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).

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

1. 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.

2. 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.

3. 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.

4. 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.

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

### CONCLUSIONS OF LAW

A. Under Federal corporate income tax provisions, a corporation pays a tax on its taxable income, and its shareholders pay personal income tax on distributions from the corporation. However, subchapter S of chapter 1 of the Internal Revenue Code provides an alternative to this pattern of double taxation for certain small business corporations. For tax purposes, the qualifying S corporation is treated as a pass-through entity similar to a partnership, and items of income, loss, gain, deduction and credit pass through to the shareholders, who include the items in their personal income. Thus, the income of an S corporation, with some exceptions, is not taxed at the corporate level, but is taxed to its shareholders.

In 1981, the Tax Law was amended to conform New York corporation franchise tax and personal income tax to the Federal subchapter S rules (Tax Law §§ 660, 208.9 as added by L 1981, ch 103, eff May 15, 1981). The Federal rules governing subchapter S corporations were amended by the Subchapter S Revision Act of 1982, and the new rules were made applicable to taxable years beginning after December 31, 1982 (PL 97-354). To maintain conformity with the Federal law, the Tax Law was amended in 1984, and the changes enacted were also made applicable to taxable years beginning after December 31, 1982 (L 1984, ch 606).

B. Although the New York income tax scheme is patterned after the Federal income tax, all items of income, loss and deduction are not treated identically for Federal and State purposes. Thus, the S corporation pass-through items included in Federal adjusted gross income are modified in computing New York income in the same ways applicable to all such items whether or not derived from S corporations (Tax Law § 612[b], [c]). A tax credit, like a deduction from income, is a form of exemption from taxation. Accordingly, a taxpayer's claim for credit against tax must rest upon applicable State Tax Law in effect for the year when the credit is claimed, and the burden of proving entitlement to a claimed credit is upon the taxpayer (see, Matter of Golden v. Tully, 88 AD2d 1058, 452 NYS2d 748, affd 58 NY2d 1047, 462 NYS2d 626).

C. In his petition and briefs, petitioner asserted that the pass-through of the employment incentive tax credit is authorized by Tax Law § 606(i). That section was added to the Tax Law by the Laws of 1984 and is applicable to tax years beginning after December 31, 1982 (L 1984, ch 606, § 7). Since the tax year at issue began before December 31, 1982, section 606(i) does not govern here. For tax years beginning before January 1, 1983, the only tax credit passed through from an S corporation to its shareholders was the credit found at Tax Law § 606(a)(9) which provided, 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."

Section 606(a)(2) provides for a credit against tax with respect to tangible personal property and other tangible property fulfilling certain specified criteria. There is no provision in section 606(a) nor in any other section of the Tax Law effective for the year in issue providing for pass-through of the employment incentive tax credit. Absent a specific statutory provision granting him the credit he claims, petitioner's request for refund must be denied.

D. The petition of Gerald Cohen is denied in all respects.

DATED: Troy, New York  
January 25, 1990

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE