

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

TWIN LAKE CHEMICAL, INC.

DECISION

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 November 30, 1976 through November 30,
1979.

Petitioner, Twin Lake Chemical, Inc., 520 Mill Street, Lockport, New York 14094, filed a petition 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 November 30, 1976 through November 30, 1979 (File No. 34131).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 24, 1984 at 10:45 A.M. and was continued to conclusion before James J. Morris, Jr., Hearing Officer, on February 4, 1985 at 2:45 P.M., with all briefs to be submitted by April 18, 1985. Petitioner appeared by Edward J. Schunk, CPA. The Audit Division appeared by John P. Dugan, Esq (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner may amend its New York State franchise tax reports filed for the periods ended the thirtieth of November 1976, 1977, 1978 and 1979 to:

(1) claim a carryforward of a net operating loss which occurred in the period ended November 30, 1975;

(2) claim a carryforward of an investment tax credit from the period ended November 30, 1975 to the periods ended November 30, 1976 and November 30, 1977; and

(3) to recompute its investment tax credit claimed in the period ended November 30, 1976 so as to avoid disallowance of inclusion of the same property in its computation of an eligible business facility credit in the period ended November 30, 1977.

FINDINGS OF FACT

1. Petitioner, Twin Lake Chemical, Inc. ("Twin Lake"), timely filed a New York State Corporation Franchise Tax Report for the fiscal years ended November 30, 1975, 1976, 1977, 1978 and 1979.

2. On July 24, 1980, the Audit Division corresponded with petitioner's representative requesting information concerning the investment tax credit claimed on petitioner's report for the period ended November 30, 1976 and further inquiring concerning the eligible business facility credit claimed on petitioner's reports for the periods ended November 30, 1977, 1978 and 1979.

In a response dated September 10, 1980 (and received by the Audit Division on September 15, 1980), petitioner's representative explained:

"...investment credit in the amount of \$1,277.25 (\$63,862.42 x 2%) was claimed on the CT-3 for the fiscal year November 31, 1976, which is not allowed since that property was included in the total amount of eligible property values for Job Incentive Board purposes.

However, investment credit carryforward in the amount of \$2,447.29 ...from the fiscal year ended November 30, 1975 was not claimed at November 30, 1976 or subsequently. The property used in computing this investment credit was not included in eligible property values for JIB purposes. Therefore, it is our intention that [petitioner] is due a credit against its New York franchise tax in the amount of \$1,170.04 (\$2,447.29 - \$1,277.25)." (Emphasis in original.)

3. On January 20, 1981, petitioner filed an amended New York State Corporation Franchise Tax Report (Form CT-3) for the period ended November 30, 1977. Such report, however, disclosed no liability, or items of income, gain or loss different from that which it originally reported, nor was claim for addition: refund or credit made thereon.

4. On April 24, 1981, the Audit Division issued to petitioner a Statement of Tax Reduction or Overpayment with respect to the period ended November 30, 1976. Said statement explained:

"Entire net income (6 months, 1975)	(25,665.53)	
Entire net income (6 months, 1976)	22,919.00	(2,746.53)
Officers' salaries 1975	11,692.30	
Officers' salaries $\frac{1}{2}$ of 1976	37,455.84	49,148.14
Total		46,401.61
Less: \$15,000 exemption		15,000.00
Balance		31,401.61
Alternative base @ 30%		9,420.48
Tax @ 10%		942.05
Surcharge @ 20%		188.40
Surcharge paid 75 report	50.00	
Surcharge paid 76 report	594.25	644.25
Reduction in surcharge		455.85 cr.

The surcharge for your 1975 and 1976 reports have been recomputed as shown above. Chapter 895, Laws of 1975, states that if the period on which the surcharge is computed is less than 12 months, the surcharge is imposed on a prorated part of the second year's tax."

Said statement further provided that the \$455.85 credit had earned interest of \$162.40 for a total credit of \$618.25, which credit, after application of \$220.23 of said credit to the period ended November 30, 1977 and \$398.02 of said credit to the period ended November 30, 1978, resulted in a net refund of zero.

5. On April 24, 1981, the Audit Division issued to petitioner a Statement of Audit Adjustment and a Notice of Deficiency for the period ended November 30, 1977. The Notice of Deficiency asserted a tax deficiency of \$173.24, plus

interest of \$46.99, for a total due of \$220.23. It also reflected a \$220.23 credit applied from November 30, 1976 resulting in a balance due of zero.

The Statement of Audit Adjustment provided, inter alia, the following explanation:

"Percentage of eligible property has been computed as investment tax credit claimed on 11/30/76 franchise report for property included for Job Incentive Board purposes per your 9/10/80 letter. Also investment tax credit for 11/75 submitted with your 9/10/80 letter is not allowed since that year is out of statute."

6. On April 24, 1981, the Audit Division issued to petitioner a Statement of Audit Adjustment and a Notice of Deficiency with respect to the period ended November 30, 1978. The Notice of Deficiency asserted a tax deficiency of \$1,248.56, plus interest of \$232.55, for a total due of \$1,481.11. It also reflected a \$398.02 credit applied from November 30, 1976 resulting in a balance due of \$1,083.09.

The Statement of Audit Adjustment provided, ~~inter alia~~, the following explanation: "See explanation on deficiency for period ended 11/30/77."

7. On April 24, 1981, the Audit Division issued to petitioner a Statement of Audit Adjustment and a Notice of Deficiency with respect to the period ended November 30, 1979. Said Notice of Deficiency asserted a tax deficiency of \$1,074.31, plus interest of \$108.78, for a total due of \$1,183.09.

The Statement of Audit Adjustment provided, inter alia, the following explanation: "See explanation on deficiency for period ended 11/30/77."

8. On or about September 5, 1983, the Department of Taxation and Finance received payment by two checks, one totalling \$466.23 and the other totalling \$312.85, issued by petitioner in respect of the deficiencies at issue herein.

9. Prior to and at the hearing in this matter, the Audit Division conceded that the Notice of Deficiency dated on April 21, 1981, ...

period ended November 30, 1977 was not timely issued and that the \$220.23 credit from the period ended November 30, 1976 applied thereto (~~see~~ Findings of Fact "4" and "5") has not since been otherwise applied or refunded to the petitioner.

10. Petitioner began business on or about May 25, 1975. For the period ended November 30, 1975, petitioner, on its federal return and New York State report, claimed a net operating loss of \$25,965.53.

11. Petitioner did not take a carryforward of the net operating loss deduction for the period ended November 30, 1975 on its New York State franchise tax report for the period ended November 30, 1976.

12. Petitioner, on its returns for the period ended November 30, 1976, showed Federal taxable income of \$42,244.04 and New York entire net income of \$45,838.45 and a tax due after credits of \$2,971.26 (not including the surcharge).

13. Petitioner, on its franchise tax report for the period ended November 30, 1976, showed \$80,629.77 in property acquired or constructed after January 21, 1975 and placed in service during the taxable year, and an investment tax credit of \$1,612.59 taken in respect thereof on its return for that year.

14. Petitioner, on its franchise tax report for the period ended November 30, 1977, claimed an eligible business facility credit in the amount of \$3,308.23. For the same period, petitioner showed \$84,392.51 eligible for the investment tax credit.

15. Petitioner, **for** the period ended November 30, 1978, claimed an eligible business facility credit in the amount of \$9,421.21.

16. Petitioner, for the period ended November 30, 1979, claimed an eligible business facility credit in the amount of \$10,301.91.

17. Petitioner's copy of its federal income tax return for the period ended November 30, 1975 indicated that petitioner, for federal purposes, had made an election to be taxed as a small business corporation. Said copy also reflected that petitioner purchased \$122,365.00 in property eligible for investment credit in such period.

18. Petitioner did not claim an investment tax credit for New York State franchise tax purposes in respect of \$122,365.00 of property purchased in the period ended November 30, 1975 on its returns filed for the periods ended November 30, 1975, November 30, 1976 and November 30, 1977.

19. Petitioner filed a "Report of Change in Taxable Income by U.S. Treasury Department" with the Audit Division for the periods ended November 30, 1976, November 30, 1978 and November 30, 1979. Insofar as the information disclosed on such reports changed petitioner's income deductions and/or credits, such information was used in determining the deficiencies at issue herein.

20. Included in the property in respect of which petitioner claimed the eligible business facility credit **in** the period ended November 30, 1977 was property in respect of which petitioner had claimed the investment tax credit on its report filed for the period ended November 30, 1976.

21. The Audit Division recomputed petitioner's computation with respect to the eligible business facility credit for the period ended November 30, 1977 to exclude that property previously included for the purposes of computing the investment tax credit petitioner took on its report filed **for** the period ended November 30, 1976. The effect of said recomputation **is** to necessitate like recomputations of petitioner's eligible business facility credits for the periods ended November 30, 1978 and November 30, 1979.

22. Petitioner argues:

(a) that it inadvertently included \$63,862.46 in the \$80,629.77 of property in the computation of the investment tax credit for the period ended November 30, 1976 and that only \$16,767.31 should have been included;

(b) that it received no economic benefit from the inadvertent inclusion of such property in the computation of the investment tax credit since, had it carried forward the investment tax credit and net operating loss deduction from the period ended November 30, 1975, it would not have used the investment tax credit created by the inclusion of such property in the investment tax credit it did claim on its report; and

(c) that pursuant to section 1087(f) of the Tax Law, the Notice of Deficiency for the period ended November 30, 1977 together with petitioner's timely petitions thereto allows petitioner's request for refund for such period; and

(d) that the "Statement of Tax Reduction or Overpayment" issued on April 1, 1981 in respect of the period ended November 30, 1976 has the same effect as a Notice of Deficiency, such that, pursuant to section 1087(f) of the Tax Law, petitioner's petition in respect thereto allows petitioner's request for refund for such period.

CONCLUSIONS OF LAW

A. That insofar as is pertinent hereto:

(1) section 1083(a) of the Tax Law provides that taxes may be assessed within three years after a return was filed;

(2) section 211.1 of the Tax Law provides that a corporation which reports on the basis of a fiscal year should file its report within two and one-half months following the close of its fiscal year;

(3) section 1083(a) of the Tax Law provides that returns filed before the prescribed due date are deemed to be filed on the last day of the prescribed due date;

(4) section 1087 of the Tax Law provides that claim for refund shall be made within three years **from** the time a return was filed or within two years from the time the tax was paid, whichever is later.

B. That on April 24, 1981, petitioner's returns for the periods ended November 30, 1975, November 30, 1976 and November 30, 1977 were barred by the applicable statute of limitations as to any claim for refund or credit by the petitioner or an additional tax due by the Audit Division.

C. That the Notice of Deficiency issued for the period ended November 30, 1977 is likewise not timely issued.

D. That petitioner's requests for refund or credit based upon (i) a carryforward of the 1975 net operating loss deduction to the period ended November 30, 1976 and (ii) a carryforward of the 1975 investment tax credit to the periods ended November 30, 1976 and November 30, 1977 are denied as time barred, claim for such refund or credit not being timely made pursuant to section 1087 of the Tax Law.

E. That although a timely filed petition to the State Tax Commission will hold a period open for purposes of interposing a claim for refund or credit in respect of such period [Tax Law §1087(f)], the Notice of Deficiency issued for the period ended November 30, 1977 was untimely and the petition with respect to such time-barred period may not now open what was barred initially,

F. That section 210.11 provides a credit against tax to a taxpayer owning or operating an eligible business facility (eligible business facility credit).

Section 210.17 provides for a credit against tax to a taxpayer

depreciable property acquired, constructed, reconstructed or erected by a taxpayer (investment tax credit). Section 210.12(f) provides that at the option of the taxpayer, property eligible for the eligible business facility credit and otherwise eligible for the investment tax credit may be treated as eligible for the investment tax credit, in which event a credit shall not be allowed as an eligible business facility (~~see also~~ Regulations of the State Tax Commission, 20 NYCRR §5-2.6).

G. That section 5-1.4(d) of the State Tax Commission's Corporate Franchise Tax Regulations, in pertinent part, provides:

"(d) The eligible business facility credit may not be claimed on real property which the taxpayer has used previously. Also, it may not be claimed on property for which the taxpayer has claimed an investment tax credit. However, if the property for which an investment tax credit has been claimed becomes eligible for the eligible business facility credit, the report on which the investment tax credit was claimed may be amended **so as** to eliminate the investment tax credit for the eligible property, if the amendment is made within the statute of limitations..." (emphasis added).

H. That section 1089(g) of the Tax Law provides:

"(g) Jurisdiction over other years. -- The tax commission shall consider such facts with relation to the taxes for other years as may be necessary correctly to determine the tax for the taxable year, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year has been overpaid or underpaid."

I. That petitioner "elected" to take an investment tax credit with respect to certain property with its report for the period ended November 30, 1976 which property was also eligible for the eligible business facility credit taken with its report for the period ended November 30, 1977. Petitioner received credit for such investment tax credit against its taxes shown due pursuant to the report it filed for the period ended November 30, 1976. Petitioner did not timely seek to amend its report for the period ended November 30, 1976 so as to change its election of the investment tax credit.

The Audit Division therefore properly disallowed in the computation of petitioner's eligible business facility credit for the periods ended November 30, 1978 and November 30, 1979 that property for which petitioner had received the investment tax credit [Tax Law §210.12(f); 20 NYCRR §5-1.4(d)] and it likewise properly resorted to recomputing such eligible business facility credit for the period ended November 30, 1977 in determining the deficiencies for the periods ended November 30, 1978 and November 30, 1979.

J. That the "Statement of Tax Reduction or Overpayment" with respect to the period ended November 30, 1976 results from petitioner's erroneous calculation of the surcharge and was determined solely from the information reported on petitioner's return without resort to additional fact or necessity of determining any issue of law. Petitioner merely computed the surcharge based upon eighteen months of income instead of twelve months. As such, were additional taxes necessarily determined and owing, such would have been the result of petitioner's "mathematical error" in calculating the surcharge owing, the assessment of which would not be a "Notice of Deficiency" (Tax Law §5108161). Concomitantly, the "credit" shown on such statement likewise merely reflects such mathematical error. To rule otherwise would require denial of the credit, the period being otherwise barred by the applicable statute limitations on assessments, refunds and credits (see Conclusions of Law "A" and "B supra).

K. That petitioner's reliance upon, ~~inter alia~~, Rev. Rul. 69-543 and Rev. Rul. 82-49 holding that loss deduction credits from periods barred by the applicable statute of limitations for assessment and refund or credit may be carried forward to open periods is misplaced. In the instance at hand, petitioner does not seek carryforward of credits from closed periods to open periods, rather

petitioner seeks that credits from barred periods be carried to barred periods to redetermine closed periods which, once redetermined, are to be applied forward to open periods. To do so would render the applicable statutory limitation periods useless and is otherwise violative of section 1089(g) of the Tax Law which permits the Commission to review periods other than the taxable period but prohibits redetermination of same.

L. That even assuming petitioner's letter of September 10, 1980 was a "proper" request for refund or credit with respect to the period ended November 30, 1977 based upon a carryforward of the claimed investment tax credit from the period ended November 30, 1975 (which was not actually claimed on such return), and that Rev. Rul. 69-543 and Rev. Rul. 82-49 are otherwise applicable, such credit is completely used up against the liability shown due for the period ended November 30, 1976, which period was otherwise time barred from otherwise recomputing liability and/or refund therefor (see Findings of Fact "2", "12" and "18"; Conclusions of Law "A", "B" and "K"; and Corporate Franchise Tax Regulations sections 5-2.1 and 5-2.7 with respect to time and manner for filing of claim for investment tax credit and carryover).

M. That the Audit Division is directed to cancel the Notice of Deficiency for the period ended November 30, 1977, credit petitioner with payment of \$779.08 toward the deficiencies for the periods ended November 30, 1978 and November 30, 1979 (see Finding of Fact "8") and credit petitioner with \$618.25 overpayment of petitioner's surcharge in the period ended November 30, 1976 to the deficiencies for the periods ended November 30, 1978 and November 30, 1979 (see Findings of Fact "4", "5" and "6" and Conclusion of Law "J").

N. That the petition of Twin Lake Chemical, Inc. is granted to the extent indicated in Conclusion of Law "M" and is in all other respects denied, and the notices of deficiency for the periods ended November 30, 1978 and November 30, 1979, after application of the payments and credits noted in Conclusion of Law "M", are in all respects sustained, together with applicable interest.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986



PRESIDENT



COMMISSIONER



COMMISSIONER