

STATE OF NEW YORK

STATE **TAX** COMMISSION

In the Matter of the Petition

of

WINFIELD INDUSTRIES, INC.

DECISION

for Redetermination of a Denial of a Certificate
of Eligibility Pursuant to the Corporation
Franchise Tax under Article 9-A of the Tax Law
for the Period Ended December 31, 1982.

Petitioner, Winfield Industries, Inc., 33 Clarence Avenue, Buffalo, New York 14215, filed a petition for redetermination of a denial of a certificate of eligibility pursuant to the corporation franchise tax under Article 9-A of the Tax Law for the period ended December 31, 1982 (File No. 50300).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on July 25, 1985 at 1:15 P.M. Petitioner appeared by Blair, Martin & Messina (Peter J. Martin, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly denied petitioner a certificate of eligibility for the period ended December 31, 1982.

FINDINGS OF FACT

1. On or about December 27, 1977, a corporation known as Winfield Industries Inc. ("Winfield I") having an Employer Identification Number ("EIN") of 16-0904121 merged with Robert Stoner, Inc.

2. Robert Stoner, Inc. was the surviving corporation to the merger (Finding of Fact "1") and it changed its name to Winfield Industries, Inc., said surviving corporation being assigned EIN 16-0997774.

3. On or about May 15, 1979, the application of Winfield Industries, Inc., EIN 16-0997774 ("Robert Stoner, Inc./Winfield II"), for a Certificate of Eligibility for State Franchise Tax Credits and for Local Real Property Tax Exemptions was approved by the Job Incentive Board.

4. On or about July 19, 1982, the assets of Robert Stoner, Inc./Winfield II were sold to A. D. Oak, Inc., a corporation having the EIN of 16-1182189.

5. Robert Stoner, Inc./Winfield II received certifications of franchise tax credits in regard to an eligible business facility for the periods December 31 1978 through December 31, 1981. Robert Stoner, Inc./Winfield II also received a certification for the period ended December 31, 1982 prorated seven/twelfths (7/12) based upon the sale of the assets of Robert Stoner, Inc./Winfield 11 on July 19, 1982.

6. A. D. Oak, Inc., EIN 16-1182189, **is** now known **as** Winfield Industries, Inc., EIN 16-1182189 ("A. D. Oak, Inc./Winfield III"), and **is** the petitioner in this matter.

7. On or about July 12, 1982, an application for a Certificate of Eligibility for State Franchise Tax Credits and for Local Real Property Tax Exemptions, together with a loan application was received by the Department of Commerce from A. D. Oak, Inc./Winfield III under **the** name of A. D. Oak, Inc. in anticipation of its purchase of Robert Stoner, Inc./Winfield II.

8. In correspondence dated August 31, 1982, Llewellyn G. Farr, Director of the Job Incentive Bureau, acknowledged **to** A. D. Oak, Inc. receipt of **an** application for Job Incentive Program benefits.

9. In correspondence dated February 4, 1983, representatives of petitioner wrote to a Mr. Donald Young of the Job Incentive Board at the New York State Department of Commerce stating, in pertinent part:

"Pursuant to our conversations of February 1 and 2, 1983 regarding the status of Winfield Industries, Inc. JIB Credit Application, I would like to recap my understanding of the situation.

Regarding the JIB credit for the [Robert Stoner, Inc./Winfield II], whose assets were sold July 19, 1982, you indicated that the credit would be allowable for them on the December 31, 1982 tax filing. Since no assets or employees existed at calendar year-end, a proration through July 19, 1982 would be made on the certificate. The company will do this and forward the completed affidavit to your office for approval prior to filing the 1982 Franchise Tax Report.

Regarding the JIB credit application for the [A. D. Oak, Inc./Winfield III], whose assets were purchased by Mr. Oak on July 19, 1982; your department has not acted on the application for over six months because of the apparent lack of eligibility. As you stated, the credit is based on newly constructed facilities, not the purchase of a going business. You also felt that even if there was a chance for approval, the allowable credit percentage would be very small compared to current levels.

Based on the above, you suggested that the [A. D. Oak, Inc./Winfield III] continue to file for the use of the existing credit since the corporate name has not changed.

I indicated to you that the [A. D. Oak, Inc./Winfield III] was a Sub 'S' corporation, and that the Sub 'S' election may be broken by the next fiscal year, and therefore revert to regular corporate tax status. You stated that the JIB credit could not pass through to the shareholder while the corporation was Sub 'S', however, if the election was terminated, the new Winfield would be eligible to use the existing JIB credit for the remaining years in the original certificate of eligibility.

The above stated facts would be satisfactory to my client, provided your department agrees to the accuracy of my understanding."

10. In correspondence dated May 11, 1983, Llewellyn G. Farr advised the representatives of petitioner, in pertinent part, that:

"I have reviewed the files for Winfield Industries, Inc., the Application for A. D. Oak, Inc., and your letter to Mr. Young of February 4, 1983.

Based on the information in the Application for A. D. Oak, Inc., this Bureau cannot recommend approval for Job Incentive benefits. If A. D. Oak, Inc. purchased all the assets and liabilities of Winfield Industries, Inc., they would be eligible to continue to receive Job Incentive benefits based on the conditions under which the project for Winfield Industries, Inc. was approved. That is, as long as employment in the facility was maintained at a level of at least 70.

Should A. D. Oak, Inc. elect Subchapter S status, then, of course, they would not be eligible for Job Incentive benefits.

Beginning on April 1, 1983, the certifying authority for corporate franchise tax credits in (sic) the New York State Department of Taxation and Finance. The file for Winfield Industries, Inc. is being forwarded to the Department of Taxation and Finance. Future correspondence on this matter should be addressed to [the Department]...".

11. Petitioner corresponded with the Department of Taxation and Finance and received correspondence dated August 31, 1983 addressed to "Robert Stoner, Inc. formerly Winfield Industries, Inc." which, in pertinent part, provided:

"Enclosed please find you (sic) Certificate of Eligibility for the period ended 12/31/82.

Expenditures for capital improvements and purchases of tangible property have been adjusted to reflect the value of such on an average annual basis.

The total eligible property value has been pro-rated @ 7/12 inasmuch as the assets of the corporation were sold approximately 7/19/82, at which time eligibility ceased to exist.

These adjustments have been made in adherence with current departmental audit policy.

Question has been posed to this office with respect to future certifications for the newly created Winfield industries Federal Employer Identification Number 16-182189.

There exists, in our file, no evidence of action on the newly created Winfield Industries [Federal Employer Identification Number 16-1182189] application, having been taken by the Job Incentive Board.

As of April 1, 1983 this department assumed a takeover of duties, with regard to the Job Incentive Program, from the Department of Commerce. However this department was limited in that it was empowered only to certify or deny corporations whose original application for Job Incentive Benefits had been approved by the board, via letter of intent prior to 7/1/82.

Accordingly, this department is prohibited to give any consideration to the application dated 7/12/82.

It is the position of this department that eligibility for the old Winfield Industries ceased at the date of the sale of the asstes (sic) included within the facility and that the newly created Winfield Industries would not be able to receive benefits emanating from the application of the former.

In view of the foregoing eligibility for Job Incentive benefits, sought by the newly created corporate entity **of** Winfield, Inc. [Federal Identification Number 16-1182189] are hereby denied."

12. It was stipulated and agreed by the parties at the hearing that A. D. Oak, Inc. now known as Winfield Industries, Inc. (A. D. Oak, Inc./Winfield 111) did not elect subchapter S status for New York State franchise tax and personal income tax purposes and that it was stipulated and agreed by the parties at the hearing that A. D. Oak, Inc./Winfield III met the other conditions mentioned in the letter of Llewellyn G. Farr of May 11, 1983, to wit, net employment in the facility was maintained at **a** level **of** at least 70.

13. Llewellyn G. Farr was the Director of the New York State Job Incentive Board and he was authorized to communicate that New York corporations were eligible to receive Job Incentive Benefits.

14. A. D. Oak, Inc./Winfield III was a new corporate entity separate and apart from Robert Stoner, Inc./Winfield 11.

15. There being no testimony presented at the hearing, Findings of Fact "1" through "14" are derived from

a) a Notice to Admit dated December 18, 1984 (Hearing Exhibit "I") to which the representatives of the Audit Division in correspondence dated January 3, 1985 (Hearing Exhibit "J") conceded it had "no objections" and the matters therein are thus deemed admitted;

b) a Stipulation (Hearing Exhibit "L") entered into by the representa-

c) correspondence (including but not limited to that correspondence referenced to in both the Notice to Admit and Stipulation) entered into evidence at the hearing; and

d) stipulations made on the record at said hearing.

16. Petitioner claims that it is entitled to claim the remainder of the eligible business facility credits granted to Robert Stoner, Inc./Winfield II on a carryover or piggyback basis.

CONCLUSIONS OF LAW

A. That section 210.11(a) of the Tax Law, as it existed prior to amendment by Chapter 15 of the Laws of 1983, provided:

"A credit against the tax imposed by this article shall be allowed to a taxpayer owning or operating an eligible business facility as defined in section one hundred fifteen of the commerce law, to be computed as hereinafter provided."

Section 210.11 of the Tax Law, as amended by Chapter 15 of the Laws of 1983, provided:

"(a) On or after April first, nineteen hundred eighty-three, a credit against the tax imposed by this article shall 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 (h) of this subdivision, and only with respect to such facility, to be computed as hereinafter provided.

* * *

(h) The state tax commission shall be empowered, on or after April first, nineteen hundred eighty-three, 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.

the codes, rules and regulations of the state of New York regarding such certificate of eligibility 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." (emphasis supplied).

B. That section 134 of Chapter 15 of the Laws of 1983 provided:

"The state tax commission shall be empowered, on or after April first, nineteen hundred eighty-three, 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, or a letter of intent authorized by section 102.4 of part one hundred two of title five of the codes, rules and regulations of the state of New York regarding such certificate of eligibility and to renew, extend, revoke or modify a certificate of eligibility for tax credits, pursuant to the provisions of section one hundred twenty of article four-A of the commerce law."

C. That 5 NYCRR 1102.4 provided:

"102.4 Letter of intent. Upon approval of an application, the board shall issue a letter of intent informing the applicant that, if there is compliance with the provisions of section 118 of the Commerce Law, a certificate of eligibility for tax credits or a certificate of eligibility for real property tax exemptions, or both, shall be issued."

D. That subdivision (f) of section 120 of Article 4-A of the Commerce Law, in pertinent part, provided:

"(f) A certificate of eligibility may be revoked by the board, after a hearing, if the board finds that the facility therein described fails in any respect to meet the requirements of section one hundred eighteen, or may be modified if the board finds that statements therein contained with reference to the matters set forth in subdivisions (d) and (e) of this section are not in accordance with the facts. Such revocation or modification may be ordered if either (i) the application for the certificate and other information supplied by the applicant failed to fully and fairly disclose the facts relevant with reference to the requirements of said section, or (ii) there has been a material change in such facts since the date when the certificate of eligibility was issued. In revoking any certificate of eligibility the board shall determine whether the facility was an eligible business facility for purposes of this section."

that such facility was not an eligible business facility at any time."

E. That with respect to the issues at hand (i.e. carryover of the remainder of Robert Stoner, Inc./Winfield II's credit to petitioner), petitioner A. D. Oak, Inc./Winfield III did not itself invest in the expansion of existing facilities thereby creating or retaining jobs within the meaning and intent of Article 4-A of the Commerce Law. Instead, petitioner argues, in effect, that it **is** continuing in the footsteps of Robert Stoner, Inc./Winfield II, which invested in the expansion of facilities and created or retained jobs, in that petitioner continues to operate the same facility and maintain the same levels of employment as did Robert Stoner, Inc./Winfield II and that, therefore, it is a successor in interest, **so** to speak, to the remainder of any eligible business facility credit to which Robert Stoner, Inc./Winfield II would have been entitled. A. D. Oak, Inc./Winfield III, however, purchased the assets of Robert Stoner, Inc./Winfield II. Petitioner **is** not the successor in interest to Robert Stoner, Inc./Winfield II by way of merger or consolidation. It **is** a separate and distinct corporate entity from Robert Stoner, Inc./Winfield II.

F. That it has not been shown otherwise and it is determined herein that a certificate of eligibility and the tax credits adhering thereto are not tangible assets **of** a corporation which may be bought, sold or traded.

G. That the Tax Commission has the authority to modify and renew pre-existing certificates of eligibility (Conclusions of Law "A" and "B") based upon the provisions of Article 4-A of the Commerce Law (Conclusions of Law "B" and "C"). The provisions of the Commerce Law (Conclusion of Law "C", Commerce Law §120[f]) relating to modification cites that such should be based upon either (1) a finding of misrepresentation in the application (which **is** not

that such authorization to modify a certificate does authorize the Tax Commission to amend Robert Stoner, Inc./Winfield II's certificate upon renewal to reflect changed circumstances such as a change of corporate name or a merger or a consolidation, it is determined that such authority does not encompass and we decline to **so** amend said certificate **so** as to make it applicable to A. D. Oak, Inc./Winfield III, a separate and distinct corporate entity (Conclusion of Law **"E"**) from that to which the original certificate was originally issued, for the reasons as stated herein and separately and additionally based on the grounds that section 210.11(h) **of** the Tax Law prohibits issuance of new certificates and/or renewals to those entities which basically were not certified as eligible prior to April 1, 1983.

H. That it may be argued that the letter of Llewellyn G. Farr dated May 11, 1983 constituted a "letter of intent" authorized by 5 NYCRR 5102.4. While the record at the hearing does not disclose what a "letter of intent" looks like, the letter of May 11, 1983 does not convey any of the "key" information one would expect a letter of intent to provide. It does not inform the petitioner that the board has acted. It does not indicate that its application was approved which appears to be a condition precedent to the issuance of a letter of intent. It does not indicate that if there is compliance with the law that a certificate will be issued. It merely appears to answer a hypothetical question that maybe petitioner might be eligible to receive benefits. It is therefore the opinion of this Commission that said letter is not a letter of intent within the meaning of 5 NYCRR §102.4. However, assuming arguendo, that said letter was a letter of intent within the meaning **of** 5 NYCRR §102.4, and that it then would be within the authority of this Commission to determine whether to issue and/or thereafter renew a certificate of eligibility, this


Commission would not issue said certificate to petitioner based upon the grounds that petitioner is not eligible therefor. Petitioner neither expanded an existing facility thereby creating or retaining jobs nor is it a successor in interest, which is to say the same person, via merger or consolidation with Robert Stoner, Inc./Winfield II, the person to whom said Certificate was issued, **so** as to say that petitioner should be entitled to use the remaining credits not used up by Robert Stoner, Inc./Winfield II.

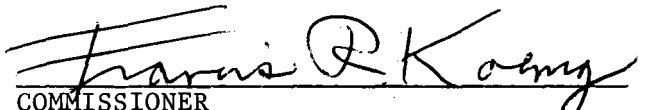
I. That the petition is in all respects denied and the denial of a certificate of eligibility and/or the denial of renewal of the existing certificate amended **in** petitioner's name is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 21 1986


PRESIDENT


COMMISSIONER


COMMISSIONER