

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

COLUMBIAN MUTUAL LIFE INSURANCE COMPANY

DETERMINATION

for Redetermination of Eligibility for
Corporation Franchise Tax Credits under Article :
9-A of the Tax Law for the Year 1983.

Petitioner, Columbian Mutual Life Insurance Company, c/o DeGraff, Foy, Conway, Holt-Harris & Mealey, 90 State Street, Albany, New York 12207, filed a petition for redetermination of eligibility for corporation franchise tax credits under Article 9-A of the Tax Law for the year 1983 (File No. 54979).

A hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. A. Harriman Office Building Campus, Albany, New York, on May 22, 1986 at 1:15 P.M., with all briefs to be submitted by November 17, 1986. Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner should be denied renewal of a certificate of eligibility for corporation franchise tax credits because the number of jobs it maintained for the tax period fell below the number required by the Audit Division - five above the number existing at the time of its initial approval as an eligible business facility.

FINDINGS OF FACT

1. The New York State Job Incentive Board ("JIB") was created in 1968 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. To meet these goals, **JIB** was empowered to grant tax credits against the State corporation franchise tax to eligible corporations.¹

2. Petitioner, Columbian Mutual Life Insurance Company ("Columbian"), is located in the Town of Vestal, New York. In 1978, Columbian found that its ability to compete in the life insurance industry was impaired by its limited office space. At about the same time, Columbian received several letters from representatives of the Department of Commerce and the Department of Taxation and Finance, stating that insurance companies were eligible to qualify for the Job Incentive Program.

3. In 1978, Columbian applied for and received approval from the New York State Insurance Department for construction of an addition to Columbian's home office building in Vestal. Columbian's application for tax credits under the Job Incentive Program was one factor weighed by the Insurance Department in arriving at its decision.

4. Columbian began construction in late 1978. Its initial Application for a Certificate of Eligibility for State Franchise Tax Credits and for Local Real Property Exemptions is dated July 17, 1979. The project being applied for was described as an expansion of Columbian's home office building through the construction of a 3½ story addition containing approximately 20,000 square feet of office space. The addition, when completed, would almost double the facility's total square footage. The total cost of the project was estimated at \$1,950,000.00, including \$200,000.00 for equipment and other tangible personal property. The

1 Governor's Memorandum, 1968 NY Legis Ann, at 494; L 1968, ch 1054.

application listed 125 jobs at the Vestal facility before completion of the project and estimated that 138 jobs would exist after completion of the project. An attached training proposal, approved by the New York State Department of Labor, stated that completion of the project would mean "an additional ten (10) to fifteen (15) new jobs to be filled within the community." Training outlines were provided for six clerk-typist positions and one computer-peripheral equipment operator.

5. On or about November 20, 1979, JIB passed a resolution approving Columbian's application and authorizing the issuance of a letter of intent to issue a certificate of eligibility. A brief prepared by the JIB staff indicates that employment figures initially submitted by Columbian were later modified, and its application was approved on the basis of 110 jobs retained, 10 jobs created and 120 total jobs, excluding executive officers. In the letter of intent, JIB stated:

"In the event your project, upon completion does not fulfill the precise plan set forth in your application[,] you may still be eligible for a Certificate providing you meet the requirements of Commerce Law Section 118."

6. For the base years 1980, 1981 and 1982, JIB authorized the issuance to Columbian of certificates of eligibility for franchise tax credits, based on affidavits of compliance timely filed by Columbian.

7. On each affidavit of compliance, Columbian was required to provide information on a Schedule E regarding "Jobs Created and/or Retained". These definitions were provided to aid the applicant in completing the required form:

- "a. Jobs Created - the number of new jobs filled at the conclusion of taxpayer's tax year as a result of an expansion or location project approved by the Job Incentive Board,
- b. Jobs Retained - the number of jobs filled at the conclusion of the tax year as a result of a plant expansion project of at least a 25% increase in square footage, a 25% increase over the

original employment at start of project, or other retention approved by the Job Incentive Board."

8. For the 1980 tax year, Columbian reported the total number of jobs "created and/or retained" as 124, including 9 new clerical jobs. For 1981, Columbian reported 121 jobs retained, and no new jobs created. For 1982, Columbian reported 117 jobs "created and/or retained". (A Schedule E was not included with the affidavit submitted in evidence; therefore, it is not known whether or not any new jobs were created.)

9. Effective April 1, 1983, the legislation creating JIB was repealed; however, the provisions of the Commerce Law governing eligibility for tax credits were continued in effect for those taxpayers who had received initial approval for eligibility prior to July 1, 1983. JIB's responsibilities for monitoring corporate franchise tax credits of previously certified units were transferred to the Department of Taxation and Finance.²

10. On January 23, 1984, Columbian filed an affidavit of compliance for 1983 where it reported 103 jobs retained and no new jobs created. It also certified that it had provided approved training programs for eight employees in that fiscal year.

11. After review of the affidavit of compliance, the Audit Division determined that Columbian did not qualify for a franchise tax credit for 1983. By letter dated June 7, 1984, the Audit Division explained its decision as follows:

"The Certificate of Eligibility was disallowed in accordance with New York State Department of Commerce Law, under Article 9-A, Section 120, which states in part that a Certificate of Eligibility may be revoked by the Job Incentive Board, if the Board finds that there has

2 L 1983, ch 15, § 57; Tax Law § 210.11(h).

been a material change of fact, since the date the Certificate of Eligibility was issued.

The basic intent of the Law, was to encourage business enterprises to expand facilities and increase employment in New York State.

The Job Incentive Board approved your application for a base level of employment of 110 employees and creation of 5 or more additional jobs.

The corporation has been issued prior Certificates of Eligibility, since employment level maintained 115 employees of [sic] more.

The decrease in employment to 103 employees as shown on your Affidavit of Compliance for the period ending December 31, 1983, is a material change in fact and the corporation has not met the intent of the program to increase employment in New York State.

Therefore, your Certificate of Eligibility is revoked for the period ending December 31, 1983."

12. The net decrease in the number of retained jobs reported by Columbian in 1983 in comparison with prior years resulted in part from an improvement in Columbian's accounting system and a concomitant layoff of 14 clerical employees. Columbian upgraded its computers and converted from a system employing keypunched data cards to one employing a magnetic tape. Because of the increased speed and efficiency of the new system, fewer clerical employees were required to carry on the operation.

13. Columbian identified 14 jobs which originated between 1978 and 1983 in areas other than the accounting area. These 14 jobs did not exist before the commencement of its participation in the JIB program, and the jobs continued to be filled at the end of 1983.

14. The JIB Brief and Resolution for the base year 1982 states: "Applicant initially approved for credit based on 10 jobs created and 110 jobs retained."

15. To explain the criteria it employed in determining that Columbian was not eligible for a tax credit in 1983, the Audit Division introduced guidelines

developed and employed by JIB "to determine if jobs were retained". In pertinent part, they state:

"I. Retention in place with expansion.

I.

- a. If firm increases space by **25%** or more and creates 5 new jobs, all jobs prior to project start are considered as retained.
- b. If a firm increases the number of jobs by at least five and such increase represents a **25%** or more increase, then all jobs prior to the project start are considered as retained."

16. As interpreted by the Audit Division, the guidelines made it necessary for an applicant to maintain an employment level at least five jobs above the number of "retained jobs" existing at the time of its initial approval as an eligible facility. Columbian was denied eligibility for the franchise tax credit for 1983 because it did not meet this requirement.

CONCLUSIONS OF LAW

A. That when Article 4-A of the Commerce Law was repealed, the responsibilities of the New York State Job Incentive Board for monitoring of franchise tax credits were transferred to the State Tax Commission. More specifically, the State Tax Commission was empowered "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" (Tax Law § 210.11[h]).

B. That Commerce Law § 120(c) authorizes the extension or renewal of a facility's certificate of eligibility for a maximum period of ten years. A certificate may be revoked upon a finding, inter alia, that there has been a material change in the facts relevant to the requirements for eligibility set forth in Commerce Law § 118 since the date when the certificate of eligibility was issued (Commerce Law § 120[f]).

C. That Commerce Law § 118, paragraphs (a) through (e), sets forth the requirements which must be met in order for a business to be eligible for tax credits. The sole requirement pertinent to this inquiry is found in paragraph (c) which states: "It shall be a facility which creates or retains in the eligible area in which it is located not less than five jobs."

D. That, in essence, the Audit Division determined that Columbian's failure to maintain at least five jobs above the number of retained jobs existing at the time of its initial approval constituted "a material change in fact" such that Columbian no longer met the requirements of Commerce Law § 118(c). The statute does not support such a determination inasmuch as Columbian met the requirement of Commerce Law § 118(c) on the facts presented herein. JIB did not intend the number of retained jobs initially agreed upon to create a fixed numerical criterion to be determinative of all future applications. To the contrary, the **JIB** letter of intent (Finding of Fact "5"), the definitions provided on Schedule **E** (Finding of Fact "7") and the guidelines adopted by JIB (Finding of Fact "15") evidence an intent to apply a flexible criterion taking into account the overall purposes of the statute. Furthermore, several recent court decisions indicate that, in the absence of statutory authority, the application of a rigid numerical criterion without regard to other facts and circumstances relevant to the underlying purposes of the legislation is unacceptable. (See Matter of Roman Catholic Diocese of Albany v. New York State Department of Health, 66 NY2d 948, 951; Leichter v. Barber, 120 AD2d 776). The purpose of the Job Incentive Program was not only to increase the number of jobs existing in designated urban areas, but also to provide job training programs for residents of those areas and "to encourage business to locate, expand and improve their facilities in such areas" (Legis. Memorandum,

1968 McKinney's Session Laws of NY, at 2334). Columbian's net decrease in jobs in 1983 resulted from an improvement of its computer system and an accompanying increase in efficiency. It would be contrary to the spirit and intent of the program to demand that an eligible business facility maintain an outmoded system of production as the price of continuing its eligibility for tax credits. In its affidavit of compliance for 1983, Columbian certified that it had provided approved training programs for eight employees in that fiscal year. In other documents submitted to the Audit Division, it asserted that fourteen jobs had been created and continued to be retained because of Columbian's investment in the new business facility. These factors along with its investment in eligible property should have been considered by the Audit Division in arriving at a determination.

E. That the petition of Columbian Mutual Life Insurance Company is granted, and its Certificate of Eligibility for Corporation Franchise Tax Credit shall be extended for the period ended December 31, 1983.

DATED: Albany, New York

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ADMINISTRATIVE LAW JUDGE