

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

A. PAVONE, INC.

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Years
ended December 31, 1981 and December 31, 1982. :

Petitioner, A. Pavone, Inc., 650 James Street, Syracuse, New York 13203
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 years ended
December 31, 1981 and December 31, 1982 (File No. 57377).

A hearing was held before Timothy J. Alston, Hearing Officer, at the
offices of the State Tax Commission, 333 East Washington Street, Syracuse, New
York, on April 4, 1986 at 9:00 a.m. with all briefs to be submitted by May 16,
1986. Petitioner appeared by Shae C. Riley and Robert Fagliarone. The
Audit Division appeared by John P. Dugan, Esq., (James Della Porta, Esq., of
counsel).

ISSUES

I. Whether petitioner was entitled to investment tax credit with respect
to equipment used to prepare pizzas.

11. Whether, assuming petitioner was not entitled to the investment tax
credit at issue herein, the Audit Division may be estopped from denying said
credit because of the Audit Division's failure to deny investment tax credit
claimed by petitioner with respect to the same equipment during a prior audit of
petitioner.

FINDINGS OF FACT

1. On November 11, 1984 the Audit Division issued to petitioner, A. Pavone, Inc., two notices of deficiency asserting additional corporation franchise tax under Article 9-A of the Tax Law for petitioner's fiscal years ended December 31, 1981 and December 31, 1982 in amounts as follows:

<u>FYE</u>	<u>ADDITIONAL TAX DUE</u>	<u>INTEREST</u>	<u>TOTAL AMOUNT DUE</u>
12/31/81	\$1,051.00	\$423.16	\$1,474.16
12/31/82	\$1,092.00	\$229.43	\$1,321.43

2. The notices of deficiency were premised upon two statements of audit adjustment issued to petitioner on August 17, 1984, which explained the Audit Division's basis for its assertion of deficiency against petitioner as follows:

"Tax Law Section 210.12(b) states that investment tax credit is allowed on property which is principally used in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing.

Since your principal business activity is retail sales of foods, you do not qualify for investment tax credit."

3. Petitioner is and was at all times relevant herein a New York corporation principally involved in the retail sale of pizzas. The equipment for which petitioner claimed investment tax credit herein was used in the preparation of pizzas for sale to its customers. Petitioner contended that the equipment in question was used in the production of pizzas by processing the various ingredients to make the final product - a cooked pizza ready for consumption.

4. The investment tax credit at issue herein represented credit which had been claimed on petitioner's 1980 franchise tax report. The unused portion of the credit was carried forward to petitioner's 1981 and 1982 reports.

5. In 1981, the Audit Division conducted an audit of petitioner and, during the course of that audit, reviewed petitioner's 1980 franchise tax report. Said report claimed investment tax credit on the identical equipment as is at issue herein. Upon completion of the audit, no additional tax was found due. At hearing petitioner contended that the Audit Division's failure to disallow its claimed investment tax credit on the prior audit constituted an acceptance of the claimed credit, and that therefore the Audit Division should be estopped from disallowing the unused portion **of** the credit which had been carried forward to subsequent tax years.

6. Petitioner introduced no evidence that it had relied to its detriment upon the Audit Division's allowance of investment tax credit for the years ended December 31, 1979 and December 31, 1980.

CONCLUSION OF LAW

A. That during the years at issue section 210.12(b) of the Tax Law provided for a credit against corporation franchise tax with respect to tangible personal property and other tangible property which was: depreciable pursuant to section 167 **of** the Internal Revenue Code; had a useful life of four years or more; was acquired by purchase **as** defined in section 179(d) of the Internal Revenue Code; had a situs in New York State; and was principally used by the taxpayer in the production of goods by processing. With respect to the aforementioned requirements, the sole issue herein is whether the property in question was used in the production **of** goods by processing.

B. That the only activity for which the equipment in question was used, **the preparation of pizzas for sale to customers (Findings of Fact "3"), does not constitute the production of goods by processing within the meaning of section 210.12(b) of the Tax Law. See Matter of General Mills, Inc.**

Group., Inc., State Tax Commission, November 9, 1984; Matter of Holiday Houses of New Jersey, Inc., State Tax Commission, March 25, 1983; Matter of John F. and Sarah Mahoney, State Tax Commission, April 1, 1976. Accordingly, the Audit Division properly denied petitioner the claimed investment tax credit at issue herein.


C. That inasmuch as petitioner has failed to establish that it relied to its detriment upon the Audit Division's allowance of its claimed investment tax credit for its years ended December 31, 1979 and December 31, 1980, its estoppel argument is without merit.

D. That the petition of A. Pavone, Inc., **is** in all respects denied, and the notices **of** deficiency dated November 1, 1984 are sustained.

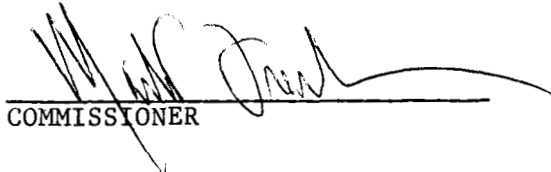
DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER