

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JTR SPECIALTIES, 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 October 31, 1981 and October 31, 1982.

Petitioner, JTR Specialties, Inc., 107 Candy Lane, Rochester, New York 14615, 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 October 31, 1981 and October 31, 1982 (File No. 60674).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on December 3, 1986 at 10:00 A.M. Petitioner appeared by Richard B. Jeary, CPA. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the Audit Division's denial of petitioner's claimed investment tax credit for certain equipment used to make frozen custard was proper.

FINDINGS OF FACT

1. On December 12, 1984, the Audit Division issued to petitioner, JTR Specialties, Inc., two notices of deficiency, asserting additional corporation franchise tax under Article 9-A of the Tax Law for petitioner's fiscal years ended October 31, 1981 and October 31, 1982 in amounts as follows:

<u>YVE</u>	<u>ADDITIONAL TAX DUE</u>	<u>INTEREST</u>	<u>TOTAL AMOUNT DUE</u>
10/31/81	\$1,608.00	\$726.75	\$2,334.75
10/31/82	\$1,686.00	\$429.34	\$2,115.34

2. The notices of deficiency were premised upon two statements of audit adjustment issued to petitioner on September 10, 1984, which explained the Audit Division's basis for its assertion of the deficiencies against petitioner as follows:

"Per Section 210.12 of the Corporation Tax Law, in order for property to qualify for investment tax credit, it must be principally used by the taxpayer in the production of goods by manufacturing, etc. Since your principal business activity is the preparing and retail selling of ice cream and not manufacturing, the property claimed for investment tax credit for the years 10/80 and 10/81 is disallowed."

3. Petitioner is and was at all times relevant herein a New York corporation principally involved in the retail sale of frozen custard (ice cream). The two pieces of equipment for which petitioner claimed an investment tax credit herein were used to prepare frozen custard for sale to its customers. Specifically, a raw mix of dairy products was poured into the machines, following which an operator injected a certain amount of air into the mix in order to achieve the proper consistency in the final product. The consistency of the raw mix may vary; consequently, an experienced operator was considered important by petitioner in order to achieve the proper consistency in the final product - frozen custard ready for consumption.

CONCLUSIONS 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.

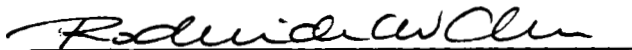
B. That the principal activity for which the equipment in question was used, the preparation of a frozen custard product for retail sale (Finding of Fact "3"), constituted the preparation of food for retail sale, and therefore did not constitute the production of goods by processing within the meaning of section 210.12(b) of the Tax Law (see Matter of General Mills Restaurant Group, Inc. v. Chu, ___AD2d___, December 4, 1986).

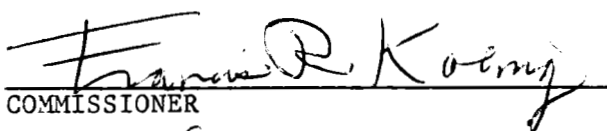
C. That the petition of JTR Specialties, Inc. is in all respects denied, and the notices of deficiency dated December 12, 1984 are in all respects sustained.

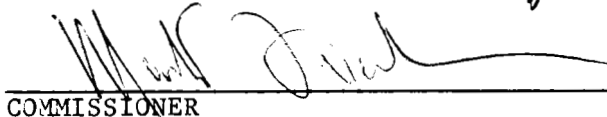
DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER