

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Dinaire Corp. :

AFFIDAVIT OF MAILING

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 June 30, :
1975 and June 30, 1976. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Dinaire Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dinaire Corp.
601 Ohio St.
Buffalo, NY 14203

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
31st day of December, 1984.

David Parchuck

Mark J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Dinaire Corp.

AFFIDAVIT OF MAILING

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 June 30, :
1975 and June 30, 1976.

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Edward J. Schunk, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward J. Schunk
Schunk & Wilson
3871 Harlem Road
Buffalo, NY 14215

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
31st day of December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 31, 1984

Dinaire Corp.
601 Ohio St.
Buffalo, NY 14203

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Edward J. Schunk
Schunk & Wilson
3871 Harlem Road
Buffalo, NY 14215
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DINAIRE CORP.	:	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 June 30, 1975 and June 30, 1976.	:	

Petitioner, Dinaire Corp., 601 Ohio Street, Buffalo, New York 14203 filed a petition for redetermination of a deficiency or refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended June 30, 1975 and June 30, 1976 (File No. 36150).

A formal hearing was held 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 9:15 A.M., with all briefs to be submitted by July 12, 1984. Petitioner appeared by Schunk & Wilson, CPA's (Edward J. Schunk, CPA). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner's method of computing its eligible business facility credit during the fiscal years at issue, which method excluded inventory from the denominator of the fraction contained in the statutory formula for determining such credit, was proper.

FINDINGS OF FACT

1. Petitioner, Dinaire Corp. ("Dinaire"), formerly known as Dormalux Co., Inc., timely filed New York State Corporation Franchise Reports (Forms CT-3) for each of the fiscal years ended June 30, 1975 and June 30, 1976.

2. On December 21, 1977, the Audit Division issued to Dinaire a separate Notice of Deficiency for each of the above noted fiscal years asserting additional tax due in the respective amounts of \$1,162.68 for the fiscal year ended June 30, 1975 and \$4,064.41 for the fiscal year ended June 30, 1976, plus interest. Statements of Audit Changes issued previously to petitioner on November 10, 1977, pertaining to the noted fiscal years, provided in relevant part as follows:

"[t]he eligible business facility credit has been adjusted by the inclusion of inventories according to the Tax Law of the State of New York, Section 210(11)."

3. Dinaire is engaged in the manufacture of wooden furniture, including tables, chairs, hutches, etc., with its facilities located at 601 Ohio Street, Buffalo, New York.

4. In or about early 1971, Dinaire was in need of more manufacturing space and considered the options of either building a new facility in one of Buffalo's suburbs or in another state, or of expanding its existing facilities at 601 Ohio Street. In the course of considering its options, Dinaire's representatives met with representatives of the New York State Department of Commerce. Discussions included Job Incentive Board Legislation and the tax credits for eligible business facilities available to companies which located or expanded existing facilities in certain eligible areas. Dinaire's facility at 601 Ohio Street fell within an eligible area, and Dinaire decided to expand its existing facility and, in so doing, take advantage of the tax credit available.

5. Dinaire first claimed the eligible business facility credit on its franchise tax return for the fiscal year ended June 30, 1973, after having reviewed its computation of the amount of such credit with representatives of

the Department of Commerce. The method used in computing such credit, as reflected on Dinaire's tax report, excluded inventory from the denominator of the fraction provided in the statutory formula used in determining the amount of the credit. The same method was used by Dinaire to compute the credit for its fiscal year ended June 30, 1974.

6. An Audit Division audit of Dinaire for its fiscal year ended June 30, 1974 yielded no change based on Dinaire's computation of the credit under the aforementioned method.

7. The deficiency for the fiscal years at issue herein is based upon the Audit Division's recalculation of the credit to reflect the inclusion of inventory in the denominator of the fraction of the statutory formula. Dinaire maintains that its computations, which excluded inventory, reflect its interpretation of the relevant statutory language, and that such method is consistent with and placed reliance upon representations made by Department of Commerce representatives that such method was proper. Finally, Dinaire asserts that the Tax Law was changed in 1976 to specifically exclude inventory from the credit calculation, and that such change merely clarified the existing law and thereby sanctioned Dinaire's method of computing the credit during the fiscal years at issue.

CONCLUSIONS OF LAW

A. That section 210.11(a) of the Tax Law provides that a taxpayer owning or operating an eligible business facility, as defined in section 115 of the Commerce Law, is allowed a credit against the franchise tax on business corporations. It is not questioned that petitioner is entitled to credit for its eligible business facility; rather it is the method of computing the amount of such credit which is at issue.

B. That section 210.11(b) provides a formula by which the amount of credit for owning or operating an eligible business facility is determined.

During the fiscal years at issue said section provided as follows:

"(b) The amount of the credit allowable in any taxable year shall be the sum determined by multiplying the tax otherwise due by a percentage to be determined by:

(1) ascertaining the percentage which the total of eligible property values during the period covered by its report, as defined in paragraph (d) of this subdivision and as certified by the New York state job incentive board, bears to the average value of all the taxpayer's real and tangible personal property within the state during such period. For the purposes of this subparagraph only, the taxpayer's real and tangible personal property shall include not only such property owned by the taxpayer but also property rented to it, and the value of rented property shall be deemed to be eight times the net annual rental rate, that is, the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(2) ascertaining the percentage which the total wages, salaries and other personal service compensation during such period, of employees, except general executive officers, serving in jobs created or retained in an eligible area by such business facility, as certified by the New York state job incentive board, bears to the total wages, salaries and other personal service compensation, during such period, of all the taxpayer's employees within the state except general executive officers.

(3) adding together the percentages so determined and dividing the result by two; provided, however, that no wages, salaries or other personal service compensation were paid or incurred by the taxpayer during such period to employees within the state other than general executive officers, subparagraph two shall be disregarded and the amount of credit allowable shall be determined by multiplying the tax otherwise due by the percentage specified in subparagraph one."

C. That subdivision (b)(1) of section 210.11 was amended by L.1976, Ch. 924, which amendment was effective as of July 27, 1976 (after the fiscal years herein at issue) and provided as follows:

"(b) The amount of the credit allowable in any taxable year shall be the sum determined by multiplying the tax otherwise due by a percentage to be determined by:

(1) ascertaining the percentage which the total of eligible property values during the period covered by its report, as defined in paragraph (d) of this subdivision, bears to the average value of all taxpayer's real and tangible personal property except for inventory within the state during such period. For the purposes of this subparagraph only, the taxpayer's real and tangible personal property shall include not only such property owned by the taxpayer but also property rented to it, and the value of rented property shall be deemed to be eight times the net annual rental rate, that is, the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from rentals." (emphasis supplied).

D. That the only issue to be decided is whether inventory was to be included as part of the (average) value of "all the taxpayer's real and tangible personal property" in computing the credit at issue during years prior to the effective date of the above-noted amendment which specifically excluded inventory from such computation.

E. That prior to the effective date of the amendment, inventory was properly includable as part of the taxpayer's real and tangible personal property for purposes of computing the amount of allowable credit. Petitioner's assertion that the amendment merely clarified the existing state of the law (and the interpretation given by the Department of Commerce and adopted by petitioner on its returns during the years at issue) is rejected. Section 208.11 of Article 9-A of the Tax Law defines "tangible personal property" to mean "corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise, and does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt." Inventory clearly falls within this definition. Moreover, the legislature's aforementioned amendment to Tax Law section 210.11(b)(1)


specifically excluded inventory from the computation, and there was no language contained in such amendment or any other indication given that such amendment was to be retroactive to prior years. The effect of the amendment was to enlarge the amount of the credit available. It is presumed that the legislature acts with a purpose, and that here the purpose was to expand the amount of the credit beyond that originally allowable, specifically by eliminating inventory from the calculation.

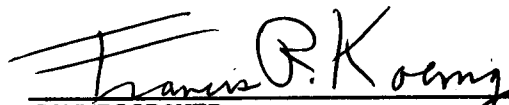
F. That the petition of Dinaire Corp. is hereby denied and the Notice of Deficiency dated December 21, 1977 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER