

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARK AND EVELYN WALSH : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827971
Personal Income Tax under Articles 22 and 30-A of the :
Tax Law and the Administrative Code of the City of :
New York for the Years 2012 and 2013. :

Petitioners, Mark and Evelyn Walsh, filed a petition for redetermination of a deficiency or for refund of personal income tax under articles 22 and 30-A of the Tax Law and the Administrative Code of the City of New York for the years 2012 and 2013.

On April 27, 2018, petitioners, appearing by Thaney & Associates (Edward F. Thaney, CPA, CVA), and on April 26, 2018, the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and submitted the matter for a determination based on documents and briefs to be submitted by October 11, 2018, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed a portion of petitioners' claimed investment tax credit, where property had been expensed under Internal Revenue Code § 179 (a) and had a useful life of less than four years.

FINDINGS OF FACT

1. Refractron Technologies Corp. (Refractron), is an S corporation and a pass-through entity. Refractron is certified as an Empire Zone (EZ) enterprise for its facilities located in Wayne County. Its certificate of eligibility was effective as of December 4, 2003.

2. Petitioners, Mark and Evelyn Walsh, owned 16.2753% of Refractron's shares in 2012 and 18.2% in 2013.

3. Petitioners claimed an investment tax credit (ITC) via the pass-through entity Refractron on their New York State resident income tax returns forms IT-201 for 2012 and 2013.

4. The Division of Taxation (Division) conducted an audit of petitioners' personal income tax returns, Forms IT-201, and Refractron's S corporation franchise tax returns and reviewed the list of properties claimed for the ITCs for the tax years 2012 and 2013.

5. Refractron claimed Internal Revenue Code (IRC) § 179 expenses as well as ITCs on its New York tax returns for 2012 and 2013.

6. Refractron claimed ITCs on its returns for 2012 and 2013 for properties with a useful life of less than four years.

7. The auditor reviewed the returns and noted that Refractron did not reduce the cost basis of the ITC property by the amount of the property expensed under IRC § 179 (a). The auditor concluded that this was in error and an adjustment was made to the cost basis, which in turn resulted in an adjustment to the ITC claimed. The auditor further determined that Refractron improperly claimed ITCs for properties listed with a useful life of less than four years, and disallowed the ITCs claimed for those properties.

8. The Division issued two notices of deficiency to petitioners for additional tax due.

Notice of deficiency, assessment ID #L-044298567, dated March 18, 2016, asserted tax due in the amount of \$13,916.00, plus interest, for tax year 2012. Notice of deficiency, assessment ID #L-044298568, dated March 18, 2016, asserted tax due in the amount of \$5,644.00, plus interest, for tax year 2013.

9. Petitioners did not submit any evidence into the record and did not timely file a brief or reply brief.

CONCLUSIONS OF LAW

A. This case involves the calculation of Refractron's cost basis and its resulting calculation of ITCs, which flowed through to petitioners for the years at issue.

Tax Law former § 210.12 (b) (i) (renumbered § 210-B [1] [b] [i]) states, in pertinent part, that:

“A credit shall be allowed under this subdivision with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are (A) principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing”

The Division's auditor adjusted the ITC claimed because Refractron elected to expense rather than depreciate the property. The Division argues that if a taxpayer elects to expense the cost of an asset under IRC § 179, that cost is not eligible for the ITC under Tax Law former § 210.12 (b). The Division argues the ITC is allowed on the federal basis of the property and, if

the property has been wholly expensed according to IRC § 179, the basis remaining is zero and there is no amount upon which to calculate the ITC.

B. IRC § 179 allows an entity to treat the purchase of qualifying property as an expense rather than a capital expenditure. The section 179 election is made on form 4562, Depreciation and Amortization. IRC § 179, regarding the election to expense certain depreciable business assets, states, in pertinent part: “Basis - A taxpayer who elects to expense under section 179 must reduce the depreciable basis of the section 179 property by the amount of the section 179 expense deduction.”

C. In reviewing Tax Law former § 210.12 (b), the statutory language is clear. The statute specifically provides for a credit for property which is depreciable pursuant to IRC § 167. In this case, rather than depreciate the property, Refractron chose to expense it. Internal Revenue Service Publication 551 states that: “If you take the section 179 deduction for all or part of the cost of the qualifying business property, decrease the basis of the property by the deduction.” Therefore, for federal purposes, Refractron has completely recovered the cost incurred in its purchase of the property, leaving a zero basis upon which to compute the ITC. With a zero cost basis, the property is no longer depreciable under IRC § 167. Thus, the ITC claimed for the years in issue were properly denied.

D. The Division also disallowed the claimed ITC where the claimed property had a useful life of less than four years. The Division’s auditor reviewed Refractron’s returns and information provided regarding Refractron’s properties, and disallowed the properties claimed with a useful life of less than four years. The statute clearly states that for the credit to be allowed, the

property must “have a useful life of four years or more” (Tax Law former § 210.12 [b]). As such, the Division properly disallowed the claimed ITC for these properties.

E. A tax credit is a particularized species of exemption from tax (*Matter of New York Fuel Terminal Corp.*, Tax Appeals Tribunal, August 27, 1998). Statutes creating exemptions from tax are to be strictly construed (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]; *Matter of Blue Spruce Farms v New York State Tax Commn.*, 99 AD2d 867 [3d Dept 1984], *affd* 64 NY2d 682 [1984]). In addition, it is well established that the interpretation given a statute by the agency authorized with its enforcement should generally be given weight and judicial deference if the interpretation is not irrational, unreasonable or inconsistent with the statute (*Matter of Trump-Equitable Fifth Avenue Co. v Gliedman*, 62 NY2d 539 [1984]). Moreover, determinations made by the Division in a notice of deficiency or determination are presumed correct, and the burden of proof is upon petitioner to establish that those determinations are erroneous (*Matter of Leogrande v Tax Appeals Tribunal*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704, 595 NYS2d 398 [1993]). Petitioners have presented no evidence or arguments to meet their burden of proof.

F. The petition of Mark and Evelyn Walsh is denied and the notices of deficiency are sustained.

DATED: Albany, New York
April 4, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE