

**REDACTED DECISION – DOCKET # 08-010 REOTC – BY MICHELE DUNCAN BISHOP, CHIEF LAW JUDGE – SUBMITTED for DECISION on AUGUST 29, 2009 – ISSUED on MARCH 2, 2009.**

### **SYNOPSIS**

A 26,000 square-foot, state-of-the-art cinema operating in a border area of the state is not engaged in the business of “destination-oriented recreation and tourism” as intended by the Legislature in the enactment of the West Virginia Economic Opportunity Tax Credit Act.

### **OVERVIEW**

The manager of the cinema filed its Petition for Refund with the West Virginia Office of Tax Appeals on January 17, 2008, asserting that it is entitled to a refund in the amount of \$\_\_\_\_\_ for tax year 2006, and to continuing application of the same amount for successive tax years through 2015, under the West Virginia Economic Opportunity Tax Credit Act.

A hearing was conducted by a presiding administrative law judge on April 16, 2008, at which hearing both parties appeared, represented by counsel. This matter has been briefed by the parties and submitted for decision on the record.

### **FINDINGS OF FACT**

1. The manager of the cinema owns and operates a 26,000 square-foot, eight-screen movie theater in a city in West Virginia. The theater has seating for approximately 1250 people, and includes an arcade area with approximately fifteen games. Movies shown at the

cinema are wide-release in nature. Petitioner presented no evidence of unusual or novel film showings at its location in a city in West Virginia.

2. The cinema is located in a strip mall complex that also houses a hotel, and “several other retail areas and restaurants.” Additional construction is underway in the strip mall area. An owner and managing member of the cinema, expects more business to locate in that area. The owner testified that customers of the cinema patronize the other businesses in the strip mall complex.

3. The theater was constructed in 2006. It has stadium seating, curved screens, and Dolby Surround Sound. The manager testified that there is no comparable facility in the area, on either the West Virginia or Kentucky side of the border. There is, however, a theater in operation in a city in Kentucky, which theater shows movies similar to those shown at the cinema.

4. The cinema in West Virginia and the one in Kentucky are fewer than thirty miles apart.

5. Approximately 200,000 patrons visit the cinema each year. According to marketing studies conducted by Petitioner, about thirty percent of those patrons are residents of Kentucky.

6. Petitioner estimates that approximately ten percent of its customers are people visiting a local tourist attraction. The manager’s testimony on this point was based on her general “knowledge of talking with” customers.

7. Petitioner places marketing materials for its business at the local tourist attraction.

8. The cinema, on October 15, 2007, applied to the State Tax Department for the West Virginia Economic Opportunity Tax Credit (“the EOTC”), citing the creation of 26 jobs and a working partnership between the cinema and the local convention and visitor’s bureau. The application was denied by letter dated November 16, 2007, and signed by General Counsel for Revenue Operations.

9. The manager was the sole witness at the evidentiary hearing of this matter.

#### **RELEVANT AUTHORITY**

1. The West Virginia Economic Opportunity Tax Credit Act, W.Va. Code § 11-13Q-1 et seq.

2. “In the absence of any definition of the intended meaning of the words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syllabus Point 1, Miners in General Group v. Hix, 123 W.Va. 637, 17 S.E.2d 810 (1941).

3. The American Heritage Dictionary (Second College Edition 1985).

#### **DISCUSSION**

The burden of proof is on Petitioner to establish by clear and convincing evidence that it is entitled to the benefits of the EOTC. W.Va. Code § 11-13Q-18.

Petitioner applied to the West Virginia Tax Department for a credit under the state’s Economic Opportunity Tax Credit. The EOTC allows eligible taxpayers a credit against the portion of the taxpayers’ state taxes “that are attributable to and the consequence of . . .

qualified investment in a new or expanded business in this state, which results in the creation of new jobs.” W.Va. Code § 11-13Q-4(a). The permissible amount of credit taken is determined by multiplying the new jobs percentage by the qualified investment in the property leased or purchased for business expansion. W.Va. Code § 11-13Q-4(b). The credit must be taken in equal parts over a ten-year period. W.Va. Code § 11-13Q-4(c). Having made a qualified investment of \$\_\_\_\_\_ in its business, and having determined that its new jobs percentage is 10%, Petitioner has claimed a credit of \$\_\_\_\_\_ per year for tax years 2006 through 2015. Respondent did not contest the calculation.

The EOTC is available only to taxpayers engaged in certain industries or business activities, including “destination-oriented recreation and tourism.” W.Va. Code § 11-13Q-19(a)(5). “Destination-oriented recreation and tourism” is not defined within the act, and no legislative rule explaining the credit exists. Petitioner argues that the term is ambiguous, and urges the presiding administrative law judge to apply the following definition: “someone traveling from one location to another for the purpose of amusement and/or relaxation, when such travel provides a source of income to a business entity,” which definition it asserts embodies the plain meaning of the words. Respondent appears to agree that the term “destination-oriented recreation and tourism” is unclear, and asks that the presiding administrative law judge look to the statute as a whole to ascertain the legislative intent. Whether Petitioner is engaged in “destination-oriented recreation and tourism” is the sole issue in this case. The presiding administrative law judge agrees that the term is ambiguous.

The Legislature codified its intended purpose of the Act as a whole. The EOTC was created “to encourage greater capital investment in businesses in this state and thereby

increase economic opportunity in this state . . . .” W.Va. Code § 11-13Q-2. What is lacking, however, is an indication as to why the Legislature saw fit to limit the credit to only certain classes of businesses, and the question central to this inquiry concerns the specific limitation for those businesses engaging in “destination-oriented recreation and tourism.” There is little or no Legislative guidance as to the purpose behind that term.

The term in question must be defined before proceeding. “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syllabus Point 1, Miners in General Group v. Hix, 123 W.Va. 637, 17 S.E.2d 810 (1941), accord Syllabus Point 6, Apollo Civic Theatre, Inc. v. State Tax Commissioner of West Virginia, 2008 W.Va. LEXIS 113. Inasmuch as there is no definition contained within the EOTC Act, “destination-oriented recreation and tourism” must be read in the common and ordinary sense.

Because the Legislature has employed the conjunction “and,” the business must engage both in recreation and tourism, not simply one or the other. There is little doubt that movie-viewing is recreational in nature.<sup>1</sup> It does not seem, however, that movie-viewing is an activity of tourism, where tourism generally is “the practice of traveling for pleasure.” The American Heritage Dictionary (Second College Edition 1985). The synthesized definition offered by Petitioner minimizes the importance of “travel” to the term.<sup>2</sup> Under the definition offered by

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<sup>1</sup> Recreation: “Refreshment of one’s mind or body after work through some activity that amuses or stimulates; play.” The American Heritage Dictionary (Second College Edition 1985).

<sup>2</sup> Travel: “To go from one place to another; journey.” The American Heritage Dictionary (Second College Edition 1985).

Journey: “Travel from one place to another; trip.” The American Heritage Dictionary (Second College Edition 1985).

Trip: “A going from one place to another; journey.” The American Heritage Dictionary (Second College Edition 1985).

Petitioner, “travel” could involve little more than crossing the street. But words like “tourism,” “travel,” “journey,” and “trip” – each appearing in definitions of the others – evoke images of

something more purposeful or coordinated, and may even suggest that something out-of-the-ordinary awaits at the end. If this part of the terminology does not express as much, however, the earlier portion of the phrase certainly does.

“Destination-oriented,” as a modifier of both “recreation” and “tourism” in the term, likewise is downplayed in Petitioner’s suggested definition. Though Petitioner asks the presiding administrative law judge to apply the credit based merely on “travel from one location to another,” this definition would incorporate only the meaning of “destination.”<sup>3</sup> But combining this with “oriented” suggests that the destination is of central importance.<sup>4</sup> That is, a “destination-oriented” location should be the draw itself, not merely ancillary to its surroundings.

An entity engaged in the business of “destination-oriented recreation and tourism,” then, must, at least, in and of itself draw travelers to its location while offering refreshment through an activity that amuses or stimulates.

Petitioner contends that its high percentage of non-resident patronage evidences its eligibility for the EOTC, but percentages are not necessarily a reliable indicator, particularly where, as here, Petitioner’s business lies so near a border area, and where the business is in such close proximity to other businesses that the strip mall complex – and not its individual parts – might be a mecca of sorts for ordinary shopping and recreation in an otherwise rural area. No reliable evidence has been presented which would show that patrons travel this city West Virginia for the primary purpose of viewing movies at the cinema. The manager testified

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<sup>3</sup> Destination: “The place to which someone or something is going or directed.” The American Heritage Dictionary (Second College Edition 1985).

<sup>4</sup> Oriented: “To become adjusted or aligned.” The American Heritage Dictionary (Second College Edition 1985).

as much at the hearing of this matter. Indeed, the evidence tends to show instead that Petitioner's business benefits from its proximity to the local tourist attraction and the cluster of businesses surrounding it.

Though the inquiry ends here, it is noted that this interpretation best seems to serve the legislative purpose. If the presiding administrative law judge were to adopt the definition proposed by Petitioner, it is difficult to imagine new or expanded businesses that would not be eligible for the EOTC. But given the Legislature's having limited the availability to a finite list of situations, the term "destination-oriented recreation and tourism" must be more restrictive. While there is little to guide the deciphering of the purpose behind the limitation, it is evident that the Legislature did not intend the credit to be available to every taxpayer building or expanding a business; otherwise there would be no limitation at all.

### **CONCLUSIONS**

It is accordingly **HELD**:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition concerning application of the West Virginia Economic Opportunity Tax Credit, the burden of proof is on the petitioning taxpayer to show entitlement to the credit. W. Va. Code § 11-13Q-18.
2. Petitioner has not carried the burden of proof in this matter.
3. A 26,000 square-foot, state-of-the-art cinema operating in a border area of the state is not engaged in the business of "destination-oriented recreation and tourism" as intended by the Legislature through the use of the common, ordinary meaning of that term.



4. Petitioner is not entitled to application of the EOTC for tax year 2006 or for the remaining tax years through 2015, according to the information pertinent to the application now before the Office of Tax Appeals.