SANITIZED DEC. – 04-019 RN – BY – ROBERT W. KIEFER, JR. – ISSUED 6/23/04

SYNOPSIS

CORPORATION NET INCOME TAX – MODIFICATION PROVIDED BY W. VA. CODE § 11-24-6(c)(6) IS NOT APPLICABLE TO TAXPAYER CLAIMING CREDIT UNDER 26 U.S.C. § 51A – Only when a taxpayer claims the federal tax credit permitted by 26 U.S.C. § 51, which results in the disallowance of the deduction of certain salary expenses and the concomitant increase in the amount of federal taxable income, is that taxpayer permitted to utilize the modification permitted by W. Va. Code § 11-24-6(c)(6), which decreases West Virginia taxable income by the amount of the salary expenses disallowed for purposes of computing federal taxable income. A taxpayer is not permitted the modification if it claims the credit provided by any other provision of the Internal Revenue Code, including Section 51A of the Internal Revenue Code.

CORRECTED FINAL DECISION

On or about January 7, 2004, the Petitioner timely filed a petition for refund of corporation net income tax, for the tax year commencing on February 1, 2002, and ending January 31, 2003. The petition for refund was received in this Office on January 12, 2004. Attached to the petition was a copy of a letter dated November 12, 2003, signed by the Tax Unit Supervisor of the Corporate & Franchise Tax Unit of the Internal Auditing Division of the State Tax Commissioner's Office, respecting the Petitioner's claim for refund advising the Petitioner that the Tax Commissioner was granting the Petitioner's claim for refund, but reducing the amount.

The reduction by the Tax Commissioner resulted from the disallowance of a modification claimed pursuant to W. Va. Code § 11-24-6(c)(6) [1998]. The claimed modification reduced West Virginia taxable income by the amount of wages and salaries paid to employees which were statutorily disallowed as a deduction in calculating federal taxable income. The

modification was disallowed because the Petitioner purportedly claimed the "welfare-to-work credit."

In its petition, the Petitioner expressly stated that it was not requesting a hearing. This Office treated this statement by the Petitioner as a waiver of a hearing in person, and determined that the matter had been submitted on documents only.

FINDINGS OF FACT

1. The Petitioner seeks a refund of corporation net income tax.

2. The Petitioner relies on the provisions of W. Va. Code § 11-24-6(c)(6), which permits a taxpayer to modify its federal taxable income by deducting the amount of salary expenses that were disallowed as a deduction for purposes of the federal income tax due to the claiming of the "federal jobs credit" under Section 51 of the Internal Revenue Code (26 U.S.C. § 51).[1]

3. In the letter attached to the petition for reassessment filed with this Office, the Petitioner contends that it is entitled to the adjustment provided by W. Va. Code § 11-24-6(c)(6), because the Petitioner claimed the welfare-to-work credit permitted by 26 U.S.C. § 51A, thereby resulting in the disallowance of wages and salaries that would otherwise be deducted in computing federal taxable income.

4. The Petitioner has presented to the Office of Tax Appeals neither its federal nor its state tax returns, nor any of the forms or schedules making up said returns, that might support its assertion that it is entitled to the refund it claims.

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[1] The credit permitted by 26 U.S.C. § 51 is called the "work opportunity credit."

5. The Petitioner has presented no documentary or testimonial evidence to show how it calculated the amount of its claimed refund.

6. The Petitioner has presented no *evidence* to prove that it is entitled to the adjustment decreasing federal taxable income that is permitted by W. Va. Code § 11-24-6(c)(6) [1998].

DISCUSSION

West Virginia taxable income for the corporation net income tax equals federal taxable income, subject to the adjustments set forth in W. Va. Code § 11-24-6. W. Va. Code § 11-24-3(25). One of the adjustments in W. Va. Code § 11-24-6(c) [1998] provides, in relevant part:

> (c) *Adjustments decreasing federal taxable income.* – There shall be subtracted from federal taxable income to the extent included therein:
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> (6) The amount of salary expenses disallowed as a deduction for federal income tax purposes due to claiming the federal jobs credit under Section 51 [26 U.S.C. § 51] of the Internal Revenue Code of 1986, as amended;

For purposes of federal income tax, a corporation may deduct certain wage and salary expenses. However, when the taxpayer claims the credit permitted by 26 U.S.C. § 51, it may not deduct that portion of the wages and salaries paid by it that are attributable to the credit claimed under that section. *See* 26 U.S.C. § 280C(a). Disallowance of these wages and salaries carries over to the computation of taxable income for the purposes of the West Virginia corporation net income tax. Therefore, absent the adjustment permitted by § 11-24-6(c)(6), for purposes of the West Virginia corporation net income tax, a taxpayer electing to take the credit permitted by 26 U.S.C. § 51 receives no deduction for wages and salaries associated with employees for which it receives the federal work opportunity credit. In effect, W. Va. Code § 11-24-6(c)(6) recognizes that the disallowance of those wages and salaries results in increased federal taxable income and,

concomitantly, West Virginia taxable income. It further recognizes that there is no corresponding West Virginia tax credit providing a benefit similar to that provided by the federal tax credit allowed by 26 U.S.C. § 51. Thus, the Legislature permits corporations claiming the federal jobs tax credit to reduce their federal taxable income by the amount of the wages and salaries that they were not permitted to deduct for purposes of federal income tax. The practical effect of W. Va. Code § 11-24-6(c)(6) is to permit corporations to reduce their West Virginia taxable income to what it would have been had they not claimed the federal jobs tax credit. Stated differently, the Legislature has permitted the deduction of those expenses that are disallowed as a deduction by the Internal Revenue Code.

The issue raised by the Petitioner in this matter is whether or not § 11-24-6(c)(6) permits it to claim the same adjustment decreasing its federal taxable income by the amount of wages and salaries paid by it, the deduction of which was disallowed because it claimed the "welfare-to-work" credit permitted by the Section 51A of the Internal Revenue Code. The Petitioner's argument, as set forth in its petition for reassessment, is somewhat sketchy, and requires this tribunal to engage in some speculation as to what it fully intended. As this tribunal reads the petition for reassessment, there are two steps to the Petitioner's argument. First, the Petitioner relies on 26 U.S.C. § 51A(d)(2), which provides that references to 26 U.S.C. § 51 in 26 U.S.C. §§ 38(b), 280C and 1396(c)(3) shall be treated as including references to 26 U.S.C. § 51A. Then, based on the fact that the reference to 26 U.S.C. § 51 in 26 U.S.C. § 38(b) includes 26 U.S.C. § 51A, it maintains that the credit it claimed by operation of the provisions of § 51A is entitled the same treatment as the credit as provided by § 51. Therefore, since 26 U.S.C. § 280C(a) disallows the deduction of wages and salaries related to the credits claimed pursuant to 26 U.S.C. § 51(a) and, by reference, 26 U.S.C. § 51A, it would follow that the Petitioner is

entitled to an adjustment decreasing its federal taxable income for those wages and salaries it was not permitted to deduct for purposes of the federal income tax.

The State Tax Commissioner takes the position that W. Va. Code § 11-24-6(c)(6) permits an adjustment only for those salary expenses that are disallowed when the credit is claimed pursuant to the provisions of 26 U.S.C. § 51. She contends that because the Petitioner seeks to adjust its income by the amount of wages and salaries that were disallowed as a deduction because it claimed the credit in accordance with the provisions of 26 U.S.C. § 51A, it is not entitled to any modification pursuant to W. Va. Code § 11-24-6(c)(6).

A review of the relevant provisions of the Internal Revenue Code lends the Petitioner's argument a superficial appeal. 26 U.S.C. § 51A(d)(2) does provide that references to 26 U.S.C. § 51 in 26 U.S.C. §§ 38(b), 280C and 1396(c)(3) shall be treated as including references to 26 U.S.C. § 51A. Consequently, insofar as 26 U.S.C. § 38(b)(2) provides that "the work opportunity credit determined under section 51(a)" is part of the general business credit, so, too, is the "welfare-to-work" credit, 26 U.S.C. § 51A, included by reference as part of the general business credit. Similarly, 26 U.S.C. § 280C(a) prohibits a taxpayer from deducting wages and salaries related to the credit claimed pursuant to 26 U.S.C. § 51A, in the same manner that a taxpayer is prohibited from deducting wages and salaries when a credit is claimed pursuant to 26 U.S.C. § 51. The two credits are intended to be similar in their operation and are coordinated pursuant to 26 U.S.C. § 51A(e).

However, even though the welfare-to-work credit is part of the general business credit permitted by 26 U.S.C. § 38 and operates in a manner similar to the "work opportunity credit" permitted by 26 U.S.C. § 51, it does not necessarily follow that it is the same credit permitted by

26 U.S.C. § 51. Certain provisions of 26 U.S.C. §§ 51 and 51A make it apparent that the two credits are not the same.

The amount of "the work opportunity credit" is a portion of the "qualified first-year wages." 26 U.S.C. § 51(a). "Qualified wages" means wages paid to members of a "targeted group." 26 U.S.C. § 51(b). 26 U.S.C. § 51(d) identifies the members of "targeted groups." In comparison, with some exceptions, the "welfare-to-work" credit defines "wage" in a manner similar to 26 U.S.C. § 51. However, the definitions are not identical. Under § 51A, "qualified wages" are targeted to different groups than are "qualified wages" under § 51. *See* 26 U.S.C. § 51A(b). The two credits are not measured by the same "qualified wages."

Of greater significance is 26 U.S.C. § 51A(e), which provides for coordination between the credits permitted by 26 U.S.C. §§ 51 and 51A. It states, in relevant part:

> Coordination with work opportunity credit. If a credit is allowed under this section to an employer with respect to an individual for any taxable year, then for purposes of applying section 51 to such employer, such individual shall not be treated as a member of a targeted group for such taxable year.

Clearly, if an employer claims the welfare-to-work credit with respect to specific employees, it may not claim the work opportunity credit with respect to those same employees. Claiming the credit pursuant to § 51A prohibits a claim pursuant to § 51. This subsection lends further credence to the Tax Commissioner's argument that the two credits are not one and the same.

The West Virginia statutory language does not support the Petitioner's argument. The clear, plain and unambiguous language of W. Va. Code § 11-24-6(c)(6) permits an adjustment decreasing federal taxable income for salary expenses disallowed when the federal jobs tax credit is claimed pursuant to 26 U.S.C. § 51. The statute, by its express terms, applies only when the credit is claimed pursuant to 26 U.S.C. § 51. No adjustment is permitted when a credit is claimed pursuant to any other provision of the Internal Revenue Code. If the Legislature had

intended to permit an adjustment of the type to which the Petitioner contends it is entitled, it would have expressly included the "welfare-to-work credit" in the statutory language, either by name, by citation to the Internal Revenue Code, or both, or it would have expressly stated that the adjustment applies to the federal jobs tax credit and other credits of a similar nature. This tribunal, which is a part of the executive branch of state government, has no authority to add language to a statute which the Legislature clearly omitted. *See* W. Va. Const. art. V, § 1 (separation of powers).

Further support is lent to this conclusion by the legislative history of W. Va. Code § 11-24-6(c)(6). The modification decreasing federal taxable income that is now contained in W. Va. Code § 11-24-6(c)(6) was initially added to that section by the 1988 amendment. *See* 1988 W. Va. Acts c. 119.[2] 26 U.S.C. § 51A was not enacted until 1997, and applied to employees hired after December 31, 1997. *See* 111 Stat. 871 (1997). Clearly, the welfare-to-work credit was not in existence at the time that the Legislature enacted the provision allowing a modification decreasing federal taxable income by the amount of the work opportunity credit provided by 26 U.S.C. § 51. Therefore, it cannot be said that in enacting what is now W. Va. Code § 11-24-6(c)(6), the Legislature intended to permit a modification decreasing federal taxable income by the amount of wages and salaries disallowed by reason of claiming the welfare-to-work credit or, for that matter, any section of the Internal Revenue Code but 26 U.S.C. § 51. Additionally, the Legislature did not amend the statute subsequent to the enactment of 26 U.S.C. § 51A, so as to indicate an intention to include 26 U.S.C. § 51A within the modification provided therein. Consequently, this tribunal does not discern any reason to believe that the Legislature intended to include 26 U.S.C. § 51A within the modification permitted by W. Va. Code § 11-24-6(c)(6).

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[2] This provision was originally codified at West Virginia Code § 11-24-6(c)(8).

Even if there was a sound legal basis for allowing the adjustment permitted by W. Va. Code § 11-24-6(c)(6) which would entitle the Petitioner to the adjustment, the Petitioner has failed to present evidence sufficient to show that it is entitled to the adjustment. It has further failed to present evidence sufficient to show that its calculation of the adjustment is correct. Therefore, its petition for refund must be denied on this ground.

The Petitioner's contention that the same adjustment should be permitted for the "welfare-to-work credit," because it and the federal jobs tax credit are similar, is without merit. The Petitioner is not entitled to claim an adjustment. Its petition for refund must be denied.

CONCLUSIONS OF LAW

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon Petitioner to show that it is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. Because the Petitioner has failed to produce any evidence to show that it is entitled to a refund or to support the computation of the refund it claims it is owed, it has failed to carry its burden of proof.

3. In accordance with W. Va. Code § 11-24-6(c)(6) [1998], the Petitioner is entitled to an adjustment decreasing its federal taxable income only if it proves that any salary expenses that were disallowed in computing its federal taxable income were as a result of its claiming the federal jobs tax credit pursuant to the provisions of Section 51 of the Internal Revenue Code.

4. The Petitioner has failed to produce any evidence to show that it had salary expenses that were disallowed in computing its federal taxable income as a result of its claiming the federal jobs tax credit pursuant to the provisions of Section 51 of the Internal Revenue Code.

5. There is nothing in the record to demonstrate that the provisions of W. Va. Code § 11-24-6(c)(6) were intended to permit an adjustment for salary expenses disallowed as a deduction for federal taxable purposes because the Petitioner claimed the credit permitted by 26 U.S.C. § 51A.

5. The Petitioner has failed to show any legal entitlement to the adjustment decreasing federal taxable income that is permitted by W. Va. Code § 11-24-6(c)(6).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of corporation net income tax for the year ending January 31, 2003, should be and is hereby **DENIED**.