

**BEFORE THE HEARING OFFICER  
OF THE TAXATION AND REVENUE DEPARTMENT  
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF THE PROTEST OF  
**TORTILLA, INC.**,  
ID NO. 02-019211-00 8,  
PROTEST TO DENIAL OF APPLICATION  
FOR INVESTMENT CREDIT

NO. 97-30

**DECISION AND ORDER**

This matter came on for formal hearing on June 23, 1997, before Gerald B. Richardson, Hearing Officer. Tortilla, Inc., hereinafter, "Taxpayer," was represented by Benjamin C. Roybal, Esq. of Rodey, Dickason, Akin & Robb, P.A. The Taxation and Revenue Department, hereinafter, "Department," was represented by Margaret B. Alcock, Esq. The facts were agreed to by the parties and argument was presented. Based upon the agreed facts and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Taxpayer is a New Mexico corporation which does business as Garduno's of New Mexico and Yesterdaves' Grill, with restaurant locations in Albuquerque and Santa Fe, New Mexico and in Las Vegas, Nevada.
2. In addition to selling meals to the patrons of its restaurants, the Taxpayer also sells "take-out" foods and other manufactured food products, such as bottled salsas.

3. In 1994, the Department audited the Taxpayer. As a result of that audit, the Taxpayer discovered that it had paid compensating tax on equipment it purchased out-of-state which it used in its New Mexico restaurant and food operations and for which it had not applied for an investment credit under the Investment Credit Act.

4. On December 21, 1994, the Taxpayer submitted to the Department an Application for Investment Credit in connection with equipment used to prepare pre-packaged dinners, side dishes and bulk food trays sold to customers on a "take-out" basis. The application requested an investment credit in the amount of \$18,977.57.

5. On January 20, 1995, the Department denied the Taxpayer's Application for Investment Credit on the basis that the investment credit is limited to equipment used in a manufacturing operation and it did not consider food preparation in a restaurant to be a manufacturing process.

6. On January 30, 1995, the Taxpayer filed a timely protest to the Department's denial of its Application for Investment Credit.

7. On February 7, 1997, the Department entered into a closing agreement with the Taxpayer. The closing agreement resolved the matters which were in dispute as a result of the Department's audit and assessment of the Taxpayer. It also resolved all but one issue raised by the Taxpayer's protest of the Department's denial of the Taxpayer's Application for Investment Credit with the Department's agreement that the preparation of "ready-to-eat" food items does qualify as a manufacturing operation under the Investment Credit Act. By the agreement, the Department agreed to grant the Taxpayer's Application for Investment Credit in the full amount requested, \$18,977.57.

8. The issue which was left open by the closing agreement, which is the only issue to be determined herein, is whether the Taxpayer is entitled to interest from the date the Application for Investment credit was filed by the Taxpayer to the date the credit was granted by the Department.

### **DISCUSSION**

The Taxpayer in this case applied for an investment credit under the Investment Credit Act, Chapter 7, Article 9A NMSA 1978, in December of 1994 and the Department denied the application for credit the following month. The Taxpayer promptly filed a protest to the denial of its application for an investment credit. The Taxpayer also had two assessments of tax in protest. In February 1997, as part of a closing agreement which settled the disputed issues concerning the Department's assessments as well as the dispute as to whether the Taxpayer was entitled to the investment credit applied for, the Department agreed that the Taxpayer was entitled to the credit and it granted it. The only unresolved issue and the matter at issue herein is whether the Taxpayer is entitled to interest on the amount of the credit claimed from the date of the denial of the credit until it was granted.

Pursuant to § 7-9A-8 NMSA 1978 of the Investment Credit Act, taxpayers with approved investment credits may obtain the benefit of their credit by either claiming the credit against the taxpayer's compensating tax, gross receipts tax or withholding tax due to the Department, or it may claim a refund of the amount of available credit by proving to the Department that either it paid gross receipts tax on the purchase price of property used in the Taxpayer's manufacturing

operation, or on the purchase of construction services used in connection with the qualified manufacturing equipment (such as constructing a building to house the manufacturing equipment) or that it paid compensating tax on the value of the qualified equipment. Because of the two year delay between the Taxpayer's application for the investment credit and when it was approved, the Taxpayer objects to not being compensated for not receiving the value of the credit in a more timely manner and claims that the Department is required to pay interest, pursuant to § 7-1-68 NMSA 1978, which requires the Department to pay interest to taxpayers on overpayments of tax under certain circumstances.

Section 7-1-68 provides in pertinent part as follows:

- A. As provided in this section, interest shall be allowed and paid on the amount of tax overpaid by a person which is subsequently refunded or credited to that person.
- B. Interest payable on overpayments of tax shall be paid at the rate of fifteen percent a year, computed at the rate of one and one-fourth percent per month or fraction thereof.
- C. Unless otherwise provided by this section, interest on an overpayment not arising from an assessment by the department shall be paid from the date the claim for refund was made until a date preceding by not more than thirty days the date on which the amount thereof is credited or refunded to any person;....

Subsection C provides for calculation of interest on overpayments which do not arise from an assessment by the Department as running from the date a claim for refund was made. Although there was no claim for refund made in this case, the Taxpayer points out that § 7-1-26, the statute which provides for claims for refund of tax, allows taxpayers to file claims for refund with the Department if they have been "denied any credit" and also provides that taxpayers may file an administrative protest to a denial of any claim for refund. Section 7-1-26(A). Thus, the Taxpayer

had the option in this case of either directly protesting the Department's denial of its application for investment credit, or of filing a claim for refund after denial of the credit and protesting the Department's denial of the claim for refund. In this case, after discussing its remedies with a representative of the Department, the Taxpayer filed a direct protest to the Department's denial of its application for the credit, because this is the procedure the Department preferred for handling the Taxpayer's administrative protest. Because the Taxpayer could have filed a claim for refund under § 7-1-26, however, the fact that no refund claim was actually filed will not be treated as barring the Taxpayer's claim for interest on its investment credit.

Regardless of the avenue by which the Taxpayer administratively protested the Department's denial of its application for an investment credit, it is clear that if the Taxpayer is entitled to interest from the date of the denial of its application to the point where the investment credit was granted, it must qualify under the provisions of § 7-1-68 because this is the only authority which exists which would require the state to pay interest with respect to taxes which were overpaid or subject to refund. The sovereign immunity of the state would bar any other claim, absent an express waiver of such sovereign immunity. *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

As noted above, § 7-1-68 applies to an overpayment of taxes which is subsequently credited or refunded to a taxpayer. A tax "overpayment" is defined at § 7-1-3(J) NMSA 1978 as follows:

"overpayment" means any amount paid, pursuant to any law subject to administration and enforcement under the provisions of the Tax Administration Act, by any person to the Department, or withheld from the person, in excess of tax due from the person to the state at the time of the payment or at the time the amount withheld is credited against tax due;....

The Taxpayer claims that the amount of its investment credit qualifies as a tax overpayment because § 7-9A-8 allows taxpayers to claim the investment credit against gross receipts, compensating or withholding taxes due. Thus, it would qualify as an overpayment every time a return reporting such taxes is filed which return also claims the investment credit against such taxes. While this may be true, it overlooks one crucial aspect of the operation of the investment credit and of § 7-1-68. Section 7-1-68(A) provides for the payment of interest on "the amount of tax overpaid by a person *which is subsequently refunded or credited to that person*" (emphasis added), and § 7-9A-8(A) requires that in order for a taxpayer to claim the investment credit against the taxpayer's compensating tax, gross receipts tax or withholding tax due the state of New Mexico, that the taxpayer must have "applied for *and been granted approval for a credit by the Department pursuant to the Investment Credit Act...*" (emphasis added). Even had the Taxpayer sought an immediate refund of the investment credit it applied for pursuant to Subsection B of § 7-9A-8, subsection B, by its unambiguous terms, limits its application to "[A] taxpayer having applied for *and been granted approval for an investment credit...*" (emphasis added). It is clear, therefore, that § 7-9A-8, the specific statute which governs the granting of investment credits and qualifies the manner in which they may be claimed and credited against future taxes or refunded, requires that first, the credit must be applied for *and approved* by the Department, before it can be refunded or credited against future tax liabilities. Thus, the amount of any investment credit cannot become an overpayment of tax which would be subject to the payment of interest, until the investment credit has been approved. Because Section 7-1-68 is the only provision of law which would authorize the payment of interest on the Taxpayer's claim for

investment credit, and any other claim for interest would be barred by the State's sovereign

immunity, the Taxpayer's claim for interest on its claim for an investment credit, prior to its approval, must be denied.

### **CONCLUSIONS OF LAW**

1. The Taxpayer filed a timely protest, pursuant to Section 7-1-24 NMSA 1978, to the denial of its Application for Investment Credit and jurisdiction lies over the parties and the subject matter of this protest.

2. The sovereign immunity of the state bars the granting of interest on the Taxpayer's claim of an investment credit for any period of time prior to the approval of the credit by the Department pursuant to § 7-9A-8 NMSA 1978.

3. Section 7-9A-8 requires that an investment credit must both be applied for and approved by the Department before the credit may be claimed against other taxes or be subject to a claim for refund.

4. Section 7-1-68 NMSA 1978 would only apply to waive the State's sovereign immunity from the payment of interest on the Taxpayer's claim for an investment credit after the Department has approved the Taxpayer's application for investment credit pursuant to Section 7-9A-8 NMSA 1978.

For the foregoing reasons, the Taxpayer's protest IS HEREBY DENIED.



DONE, this 12th day of August, 1977.