**Final Written Determination**

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| **Docket Number:** | **WFD-P-2000-1** |

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| **Tax Type:** | **Corporate Income Tax** |
| **Brief Description:** | **Business and Job Development Credits** |
| **Keywords:** |  |
| **Approval Date:** | **11/22/2000** |

**Body:**

Office of Administrative Appeals  
  
  
November 22, 2000

RE: Written Final Determination, Docket No. 00-354  
  
  
On May 15, 2000, the Taxpayer timely filed a written request for an Informal Conference with the Kansas Secretary of Revenue (Secretary). The Taxpayer’s request was in response to the Kansas Department of Revenue’s (Department) March 27, 2000 denial of an income tax refund request for the fiscal year ending February 28, 1999.

Background

On February 4, 2000, the Taxpayer filed amended Kansas corporate income tax returns for the fiscal years ending February 28, 1998 (FYE 98) and February 28, 1999 (FYE 99). The returns were filed to carryover the unused portion of the Business and Job Development Credit (Credit) that originated in the fiscal year ending February 28, 1997 (FYE 97).  
  
The FYE 97 Credit was based on a total of 21 qualified business facility employees engaged in employment as a direct result of the Taxpayer’s investment in a qualified business facility. In FYE 98, the Taxpayer maintained a sufficient number of employees to be entitled to carryover any unused portion of the Credit. However, in FYE 99 none of the 21 qualified business facility employees continued to be maintained in employment. In fact, the total FYE 99 employment was less than the total FYE 96 base year’s employment.  
  
On March 27, 2000, the Department allowed the Credit for FYE 98 and refunded the tax with interest. The Credit for FYE 99 was denied because the Taxpayer did not continue to maintain the minimum number of employees required by K.S.A. 79-32,160a(d). The Taxpayer was further informed that “the credit ends.”  
  
Instructions previously provided with Schedule K-34 contained the following statement regarding unused Credit: “If you do not qualify this tax year as a result of not having enough qualified employees, you should try to qualify and claim the carryover credit next tax year.”  
  
The Department’s **current policy** with respect to a Credit that may be carried over is as follows:  
  
“For any taxable year beginning after December 31, 1999, a taxpayer who fails to maintain the required number of qualified business facility employees in any taxable year is ineligible to claim a carryover credit in that year. Further, a taxpayer who fails to maintain the required number of qualified business facility employees in any taxable year is ineligible to claim a carryover credit in any succeeding taxable year, notwithstanding the fact that the required number of qualified business facility employees may later be restored, rehired or reinstated.”  
  
The Department’s current policy is also reflected in the revised Schedule K-34 instruction that states: “In order that you may claim the carryover credit for a particular facility the number of qualified business facility employees must equal or exceed the two, five or twenty, depending upon the minimum number of employees necessary to qualify. If you do not have the minimum number of employees necessary at a particular previously qualified investment that credit ends.”

Discussion

The carryover of a Credit is authorized by K.S.A. 1999 Supp. 79-32,160a(d) that provides:

“The credit allowed by subsection (a) for each qualified business facility employee and for qualified business facility investment shall be a one-time credit. If the amount of the credit allowed under subsection (a) exceeds the tax imposed by the Kansas income tax on the taxpayer’s Kansas taxable income . . . for the taxable year, or in the case where the qualified business facility investment was made prior to January 1, 1996, 50% of such tax imposed upon the amount which exceeds such tax liability or such portion thereof may be carried over for credit in the same manner in the succeeding taxable years until the total amount of such credit is used. Except that, before the credit is allowed, a taxpayer, who meets the definition of a manufacturing business in subsection (d) of K.S.A. 74-50,114 and amendments thereto, shall recertify annually that the net increase of a minimum of two qualified business facility employees has continued to be maintained and a taxpayer, who meets the definition of a non-manufacturing business in subsection (f) of K.S.A. 74-50,114, and amendments thereto, shall recertify annually that the net increase of a minimum of five qualified business facility employees has continued to be maintained.”

The Department’s previous Schedule K-34 instruction was inconsistent with the provisions of K.S.A. 79-32,160a(d) when it instructed a taxpayer who failed to maintain the required minimum number of qualified business facility employees in any taxable year to later attempt to claim a carryover Credit in a succeeding taxable year. The revised Schedule K-34 instruction is consistent with the statute and correctly states that the Credit ends if a taxpayer fails to maintain the required minimum number of qualified business facility employees.  
  
A change in the Department’s policy with regard to the carryover of the Credit may affect legitimate interests of a taxpayer who relied on the instruction and made investments and hired employees at a time when the previous instruction for Schedule K-34 was in effect. The revised Department policy took this into account and applied the change in policy prospectively for taxable years after December 31, 1999.

Conclusion

Upon reconsideration of all of the facts and issues, it is the final determination of the Secretary’s Designee that the Department’s denial of the refund for FYE 99 be sustained. The Taxpayer failed to maintain the required minimum number of qualified business facility employees in FYE 99 and is precluded from qualifying for the Credit. However, since the Taxpayer’s FYE 00 began prior to December 31, 1999 the Taxpayer is not precluded by the Department’s current policy from claiming a carryover Credit for that year, provided the Taxpayer maintained the required minimum number of qualified business facility employees. The Taxpayer may also carryover any unused Credit to subsequent years so long as the required minimum number of qualified business facility employees is continuously maintained. If in any subsequent year the minimum number is not maintained by the Taxpayer, then the Credit ends.  
  
  
  
  
Sincerely,  
  
  
  
  
DAVID J. HEINEMANN  
Secretary’s Designee  
  
  
cc: James Bartle  
  
  
  
**Date Composed: 12/05/2000 Date Modified: 10/09/2001**