

**STATE OF ARKANSAS
DEPARTMENT OF FINANCE & ADMINISTRATION
OFFICE OF HEARINGS & APPEALS
ADMINISTRATIVE DECISION**

IN THE MATTER OF [REDACTED]
[REDACTED]
ACCT. NO.: [REDACTED]

INVESTARK CREDIT DENIAL
AUDIT NO.: [REDACTED]
AUDIT YEAR: [REDACTED]

DOCKET NO.: 19-231

DISALLOWED EXPENDITURES:
[REDACTED]

**TODD EVANS, ADMINISTRATIVE LAW JUDGE
APPEARANCES**

This case is before the Office of Hearings and Appeals upon a written protest received April 26, 2018, signed by [REDACTED], Tax Manager, on behalf of [REDACTED], the Taxpayer. The Taxpayer protested a partial InvestArk Tax Credit Denial issued by the Department of Finance and Administration (“Department”). The Department was represented by Michelle Bridges-Bell, Attorney at Law, Office of Revenue Legal Counsel (“Department’s Representative”).

At the request of the Taxpayer, this matter was considered under written documents. A briefing schedule was established for the parties by letter dated November 29, 2018. The Department filed its Opening Brief on January 17, 2019. The Taxpayer filed its Response Brief on January 28, 2019. The Department did not file a Reply Brief. The record was closed and this matter was submitted for a decision on March 6, 2019.

ISSUE

Whether the Taxpayer proved entitlement to an InvestArk Tax Credit with respect to the disallowed expenditures. No.

PARTIES' PROPOSED FACTS AND ANALYSIS

The Department's Representative alleged certain facts within her Opening Brief, providing in pertinent part, as follows:

On [REDACTED], AEDC sent a letter to the Taxpayer that certified the Taxpayer was doing business as a Manufacturer and had met the eligibility requirements of the InvestArk incentive provided by §15-4-2706(c)(1)(A) of the CIA. **Exhibit 3.** The approved Incentive Application, [REDACTED], involved an investment of [REDACTED] for the expansion of the Taxpayer's facility at [REDACTED] in [REDACTED], Arkansas. **Exhibit 4.** It is important to note that the letter which certified the Taxpayer had met eligibility requirements was for content only. All reported expenditures are subject to audit by DFA to determine eligibility, which may result in a reduction of credit or a tax liability. See **Exhibit 1 and 2.** Benefits for the project began [REDACTED].

AEDC specifies that the investment in a capital project under InvestArk must be "at a single location ... for new construction, expansion, or modernization." See **Exhibit 1** at page 1 and **Exhibit 2** at page 139. In its application, the Taxpayer stated the physical location of the project was located at [REDACTED]. See **Exhibit 4.** The Taxpayer also listed the [REDACTED] as the name and location of the project in its Annual Project Expenditure Report. **Exhibit 5.** In the Annual Project Expenditure Report, the Taxpayer allocated [REDACTED] for the purchase of "Machinery and Equipment." Of that amount, the total of expenditures disallowed was [REDACTED] in the "InvestArk Project - Expenditure Audit Summary because the equipment purchased was used at multiple facilities not approved for the [REDACTED] project. **Exhibit 6.** The total of expenditures disallowed was [REDACTED], therefore, the disallowed 7% InvestArk credit was [REDACTED]. See **Exhibit 6 and 7.**

On April 26, 2018, the Taxpayer submitted a letter that in pertinent part stated:

For the calendar year [REDACTED], [REDACTED] requested and was granted incentive credit for InvestArk Project [REDACTED] at our [REDACTED] in [REDACTED]. We [REDACTED] in the nation and it is in [REDACTED]. Since we control the quality of [REDACTED] through the [REDACTED], part of what we do is [REDACTED] in the state to [REDACTED] until they are ready for [REDACTED]. One of the investments to modernize our operation included a new method for [REDACTED] while [REDACTED] to more effectively manage [REDACTED]. Since [REDACTED] need to be [REDACTED].

█, it is critical that we have accurate and timely measurements. The project included installing █ at █ who █ and the means to relay █.

In the review process, this project was disallowed because █ were not installed at the plant. [Footnote omitted.] The reasoning behind this decision was that InvestArk only allowed investments to take place at one particular location for which the incentive was approved.

Exhibit 8. The Taxpayer correctly identified the reason for the disallowment. AEDC specifies that the investment in a capital project under InvestArk must be “at a single location ... for new construction expansion, or modernization.” **See Exhibit 1** at page 1 **and Exhibit 2** at page 139.

Within her Opening Brief, the Department’s Representative asserted that the InvestArk credit is limited to expenditures incurred for facilities performing complementary or similar activities within the locality of the relevant project facility. She stated the relevant project facility was located on █ in █, Arkansas. Due to her understanding of the governing statutes and regulations, she reasoned that the expenditures incurred at the █ (not located in the locality of the project facility) must be denied.

Within his Response Brief, the Tax Manager explained that the relevant project facility is the █ of the █ located at the █. He further explained that the relevant project facility must █ from █. The assumed profitability improvement of the improvements at the █ was at least █. Since the equipment installed at the █ benefitted the relevant project facility, he reasoned that those expenditures should be allowed to qualify for the InvestArk credit.

After a general discussion of the burdens of proof in tax proceedings, a legal analysis with associated conclusions shall follow.

CONCLUSIONS OF LAW

A. Standard of Proof

Ark. Code Ann. § 26-18-313(c) (Supp. 2017) provides, in pertinent part, as follows:

The burden of proof applied to matters of fact and evidence, whether placed on the taxpayer or the state in controversies regarding the application of a state tax law shall be by **preponderance of the evidence**. [Emphasis Added.]

A preponderance of the evidence means the greater weight of the evidence. *Chandler v. Baker*, 16 Ark. App. 253, 700 S.W.2d 378 (1985). In *Edmisten v. Bull Shoals Landing*, 2014 Ark. 89, at 12-13, 432 S.W.3d 25, 33, the Arkansas Supreme Court explained:

A preponderance of the evidence is “not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

The Department bears the burden of proving that the tax law applies to an item or service sought to be taxed, and a taxpayer bears the burden of proving entitlement to a tax exemption, deduction, or credit. Ark. Code Ann. § 26-18-313(d) (Supp. 2017). Statutes imposing a tax or providing a tax exemption, deduction, or credit must be reasonably and strictly construed in limitation of their application, giving the words their plain and ordinary meaning. Ark. Code

Ann. § 26-18-313(a), (b), and (e) (Supp. 2017). If a well-founded doubt exists with respect to the application of a statute imposing a tax or providing a tax exemption, deduction, or credit, the doubt must be resolved against the application of the tax, exemption, deduction, or credit. Ark. Code Ann. § 26-18-313(f)(2) (Supp. 2017).

The administration of the InvestArk Tax Credit occurs under the Arkansas Tax Procedure Act. Ark. Code Ann. § 15-4-2711(b) (Repl. 2016).

B. InvestArk Tax Credit

Initially, it appears uncontested between the parties that the Taxpayer's expansion of its facility located at [REDACTED] in [REDACTED] Arkansas generally qualifies for the InvestArk Tax Credit. The parties, however, disagree on whether certain expenditures incurred for equipment located and utilized at [REDACTED] qualify as "eligible project costs."

The allowable credit under the InvestArk Program is explained within the Arkansas code as follows:

- (A) If allowed, the credit shall be a percentage of the **eligible project costs**.
 - (B) The amount of the credit shall be five-tenths of one percent (0.5%) above the state sales and use tax rate in effect at the time a financial incentive agreement is signed with the commission.
 - (C) In any one (1) year following the year of the expenditures, credits taken cannot exceed fifty percent (50%) of the direct pay sales and use tax liability of the business for taxable purchases.
 - (D) Unused credits may be carried forward for a period of up to five (5) years beyond the year in which the credit was first earned.
- Ark. Code Ann. § 15-4-2706(c)(3) (Supp. 2017) (Emphasis supplied).

A "project" is defined as follows:

- (A) "Project" means costs associated with the:

- (i) Construction of a new plant or facility including, but not limited to, land, building, production equipment, or support infrastructure;
 - (ii) Expansion of an established plant or facility by adding to the building, production equipment, or support infrastructure; or
 - (iii) Modernization of an established plant or facility through the replacement of production or processing equipment or support infrastructure that improves efficiency or productivity.
- (B) **“Project” does not include:**
- (i) Expenditures for routine repair and maintenance that do not result in new construction or expansion;
 - (ii) Routine operating expenditures;
 - (iii) **Expenditures incurred at multiple facilities;** or
 - (iv) The purchase or acquisition of an existing business unless:
 - (a) There is sufficient documentation that the existing business was closed; and
 - (b) The purchase of the existing business will result in the retention of the jobs that would have been lost due to the closure.
- (C) Eligible project costs must be incurred within four (4) years from the date a financial incentive agreement was signed by the commission;

Ark. Code Ann. § 15-4-2703(31) (Repl. 2016) (Emphasis supplied).

A “facility” is defined as “**a single physical location** at which the eligible business is conducting its operations . . .” Ark. Code Ann. § 15-4-2703(13) (Repl. 2016) (Emphasis supplied.). The Arkansas Economic Development Commission is authorized to promulgate regulations for enforcement of the applicable subchapter. Ark. Code Ann. § 15-4-2710(1) (Repl. 2016). Pursuant to that authority, the Arkansas Economic Development Commission has further clarified the definition of “facility.” At the time of the AEDC certification letter (dated [REDACTED]), Section II(16) of the Consolidated Incentive Act of 2003 (Act 182 of 2003, as amended) Rules and Regulations (CIA Final Rules 2011 (08/15/2011)) (F 08-22-11) defines facility as follows: “a single physical location at which the eligible business is conducting its operations. A physical location may consist of more than one facility of the eligible business located **on non-contiguous**

property within the same incorporated city that is conducting similar or complimentary activity . . . [Emphasis supplied.]”

The Tax Manager has explained the [REDACTED] located at [REDACTED] were important to the operation of its facility at [REDACTED], Arkansas. The governing regulations and statutes, however, state that eligible project costs cannot occur at multiple facilities. Eligible project costs may only be incurred at properties located within the same incorporated city that are conducting similar or complementary activity. Here, it is not evident that any of the Taxpayer’s [REDACTED] meet that requirement. It is the Taxpayer’s burden to prove entitlement to a tax credit. Since the requirements of the credit have not been met with respect to the protested expenditures, those expenses were appropriately denied.

DECISION AND ORDER

The Department’s denial of the InvestArk tax credit with respect to the protested expenditure is sustained. The file is to be returned to the appropriate section of the Department for further proceedings in accordance with this Administrative Decision and applicable law. Pursuant to Ark. Code Ann. § 26-18-405 (Supp. 2017), unless the Taxpayer requests in writing within twenty (20) days of the mailing of this decision that the Commissioner of Revenues revise the decision of the Administrative Law Judge, this decision shall be effective and become the action of the agency.

The revision request may be mailed to the Assistant Commissioner of Revenues, P.O. Box 1272, Rm. 2440, Little Rock, Arkansas 72203. A revision request may also be faxed to the Assistant Commissioner of Revenues at

(501)683-1161 or emailed to revision@dfa.arkansas.gov. The Commissioner of Revenues, within twenty (20) days of the mailing of this Administrative Decision, may revise the decision regardless of whether the Taxpayer has requested a revision.

Ark. Code Ann. § 26-18-406 (Supp. 2017) provides for the judicial appeal of a final decision of an Administrative Law Judge or the Commissioner of Revenues on a final assessment or refund claim denial; however, the constitutionality of that code section is uncertain.¹

OFFICE OF HEARINGS & APPEALS



TODD EVANS
ADMINISTRATIVE LAW JUDGE

DATED: March 15, 2019

¹ See *Board of Trustees of Univ. of Arkansas v. Andrews*, 2018 Ark. 12.