

Approved: 3/3/94
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 7:00 a.m. on March 1, 1994 in Room 123-S of the Capitol.

Members present: Senators Burke, Downey, Feleciano, Gooch, Harris, Hensley, Kerr, Petty, Ranson, Reynolds, Steffes, Salisbury and Vidricksen

Committee staff present: Lynne Holt, Legislative Research Department
Bob Nugent, Revisor of Statutes
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee: Mark Russell, President, LaSiesta Foods, Inc.
William Traham, C.P.A.
Mark Burghart, General Counsel, Division of Taxation, Kansas
Department of Revenue

Others attending: See attached list

Senator Burke moved and Senator Ranson seconded to approve the minutes of February 23, 24 and 25, 1994. The motion carried on a voice vote.

Hearing and possible action on SB 768-Modifies job expansion & investment credit act

Mark Russell, President, LaSiesta Foods, Inc. testified in support of SB 768. He stated they have expanded production facilities four times since 1982, and have found the provisions of business incentive programs extremely important in helping build facilities and add jobs. A large part of the growth has been in an enterprise zone that has been established by the city of Topeka. Recent actions by the Department of Revenue have reversed the promises that were made to all expanding businesses in the early years of that program. Last year the Audit Division of the Department of Revenue reviewed their state tax returns and disallowed the credit relating to the 1982 expansion. The rationale was that the enterprise zone did not exist in June, 1982 when construction began. The expansion was completed and production began in November 1982. The enterprise zone was established in October 1982, see attachment 1. SB 768 adds to K.S.A. 1993 Supp. 79-32-154 under "Qualified business facility" "Such facility shall be deemed to be established as a qualified business facility when first employed in the operation of a revenue producing enterprise as defined in subsection (c) and such establishment shall prevail for all purposes under K.S.A. 79-32-153 and 79-32-154, including qualification for the credit for any taxpayer who establishes a qualified business facility within an enterprise zone and related qualified facility employees under K.S.A. 79-32,153 and 79-32,154, from date of original enactment."

William Trahan, C.P.A., stated that the establishment of a business enterprise was a process which took some significant period of time. The position taken by the Department of Revenue is that the first blade of dirt constitutes the establishment of a business enterprise. The Legislature, in its original enactment, defined the introduction of laborers as the critical element to begin the qualifications. Without workers it is not easy to produce. This bill speaks clearly as to the time at which a business enterprise is deemed to have been established.

Mark Burghart, General Counsel, Division of Taxation, Kansas Department of Revenue, explained when the enterprise zone legislation went into effect it was to serve as an incentive for expansion and growth in the state of Kansas. The Board of Tax Appeals has consistently ruled that if the taxpayer commences construction in advance of the zone designation they do not qualify for the enterprise zone. This bill would grant retroactive tax credits to taxpayers such as Mr. Russell.

In response to questions from the Committee, Mr. Burghart replied the law has always been the year in which you commence a commercial operation, which by definition, is when the facility is in such a condition that it can actually produce. When the original zone legislation was passed it was made absolutely clear that it was to serve as an incentive. The audit division is a separate division, and audits are performed randomly.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on March 1, 1994.

Under the Job Expansion and Investment Credits Act there has never been any specific audit of a taxpayer because of this credit.

The hearing was closed on SB 768.

The Committee discussed drafting an amendment that would more narrowly define who is eligible under SB 768. The Chairman announced SB 768 would be addressed again Thursday, March 3, 1994.

The Chairman adjourned the meeting.

The next meeting is scheduled for March 3, 1994.

GUEST LIST

COMMITTEE: SENATE COMMERCE COMMITTEE

DATE: 3/1/94

[illegible]

TESTIMONY OF MARK B. RUSSELL BEFORE THE SENATE COMMERCE COMMITTEE

SENATE BILL 768

My name is Mark Russell, and I am the president of La Siesta Foods, Inc. in Topeka. I am here to testify in support of Senate Bill 768. We have expanded our production facilities four times since 1982, and have found the provisions of business incentive programs extremely important in helping us build facilities and add jobs. We have seen our employment base go from 14 employees in the period just before our first expansion in 1982 to 270 employees currently. A large part of that growth has been provided through the fact that our plant is located in an enterprise zone that has been established by the City of Topeka. Recent actions by the Department of Revenue have reversed the promises that were made to us and all expanding businesses in the early years of that program.

My father purchased La Siesta in 1978. In 1982, one of our customers asked us to expand our product lines which required us to build a plant to produce flour tortillas. This plant was financed with industrial revenue bonds issued by the City of Topeka. As part of the discussions with the City of Topeka, my father was told that the City was establishing an enterprise zone in our area and that this new facility would qualify for tax incentives. We did begin construction on the plant in June, 1982. It was completed and production begun in November, 1982. The City of Topeka completed the designation of the enterprise zones and obtained approval by the State of Kansas in October, 1982. Under the provisions available in the incentive legislation, we elected to defer taking the credit until 1985. Every year since we have worked with the Department of Revenue to determine the amount of the credit available. Last year, the Audit Division of the Department of Revenue reviewed our state tax returns and disallowed the credit relating to this 1982 expansion, much to our amazement.

Their rationale for disallowing the credit was that the enterprise zone did not exist in June, 1982 when we began construction. The enterprise zone was established in October, 1982 when it was approved by the State of Kansas. Since the enterprise zone did not exist, it could not have enticed us to build and therefore we should not have the credit available to us. Our position is that the credit should be determined when the facility is placed in service, and therefore the credit was claimed correctly. We cannot find any authority for the position being taken by the Department of Revenue, nor can they cite one for us. This is strictly their interpretation. We have countered with a number of reasonable arguments which they do not accept. Our arguments are:

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Attachment 1-1

- Even though the enterprise zone did not exist when the project was planned, business and city leaders were working on developing the program and encouraging businesses to grow in the area based on the knowledge that enterprise zones would be developed. A business should not be penalized because it proceeded based upon a reasonable assurance by a city.
- Establishing the start of construction as the time the credit is determined goes contrary to every other position of tax law. Depreciation, depletion, and all other tax items which are based on fixed assets are determined when the asset is placed in service. Under the definition by the Department of Revenue, land could be purchased in 1984 with the intent of future expansion with the expansion being started and completed in 1994. The Department would deny the credit because it is only available for 10 years, and construction was started when the land was acquired with the intent to build.
- The intent of the law was to add jobs in areas designated as enterprise zones. The effect in 1982 was to add 46 jobs in November, 1982 after the enterprise zone was established.

Currently, Kansas businesses face a dilemma. One part of State Government works very hard to promote business growth and development. Business is told about all of these incentive programs that are available if they grow or relocate. Then another part of State Government comes in after the business has made a commitment to see how much of that commitment can be avoided. That is not a strong business development program. It is not a consistent message to businesses that are considering the State for a location or expansion. There are only a few companies that could be currently affected by this law. It does not contain any provisions that significantly reduce revenue. It is a significant statement by the Legislature however. It is a statement that you wish to promote business development. It is a statement that you wish to be a willing partner to business growth and development, and not a reluctant bridegroom.

Thank you for the opportunity to address this committee, and your attention.