

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ALLIED GROCERS COOPERATIVE, INC. : DECISION
for Review of a Denial, Suspension, Cancellation or :
Revocation of a License, Permit or Registration under :
Articles 20 and 20-A of the Tax Law. :

Petitioner, Allied Grocers Cooperative, Inc., One Market Circle, Windsor, Connecticut 06095, filed an exception to the determination of the Administrative Law Judge issued on February 9, 1989 with respect to its petitions for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 20 and 20-A of the Tax Law (File Nos. 805942 and 806031). Petitioner appeared by Davis and Trotta (Robert D. Trotta, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Both petitioner and the Division filed briefs on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether Tax Law § 480(2)(b), which authorizes the Commissioner of Taxation and Finance to refuse to license as a cigarette wholesale dealer or agent an applicant convicted of a crime provided for in the Tax Law within the preceding five years, may be applied to an applicant convicted of a Tax Law crime prior to the effective date of the licensing statute.

II. Whether the application of Tax Law § 480(2)(b) violates the ex post facto clause of the United States Constitution.

III. Whether the application of Tax Law § 480(2)(b) violates petitioner's constitutional guarantees of due process.

IV. Whether the Cigarette Marketing Standards Act violates the commerce clause of the United States Constitution.

V. Whether the Commissioner of Taxation and Finance abused his discretion by proposing to suspend petitioner's license as a wholesale dealer for the maximum period allowed by law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioner, Allied Grocers Cooperative, Inc. ("Allied"), is a cooperative organization with approximately 247 members, including approximately 60 New York members. Its business offices and storage facilities are located in Windsor, Connecticut. Allied has been, and is now, licensed by New York as a cigarette stamping agent and a wholesale dealer in cigarettes. In January 1987, Allied pleaded guilty to five counts of violating section 484(a)(1) of the Tax Law, a class B misdemeanor. Specifically, Allied was involved in a rebate scheme whereby its members were sold cigarettes at a price below the minimum provided for by statute. The rebate scheme was instituted by the head of Allied's sales and service department. It was ended when an investigation of Allied's pricing policies was begun. Allied cooperated fully in the investigation and provided the investigators with complete access to its computerized records. The person instigating the rebate scheme no longer works for Allied.

On December 4, 1987, the Division of Taxation issued to Allied a Notice of Proposed Suspension of License as a Wholesale Dealer of Cigarettes. The notice advised Allied that pursuant to Tax Law § 484(a)(4) the Division proposed to suspend its wholesale dealer's license for a period of 30 days, based upon Allied's violations of Tax Law § 484(a)(1). Allied timely filed a request for a conciliation conference challenging the proposed suspension. On May 20, 1988, the Bureau of Conciliation and Mediation Services issued an order sustaining the

suspension notice. On August 16, 1988, Allied filed a petition with the Division of Tax Appeals, seeking review of the notice of proposed suspension.

On July 29, 1988, Allied submitted an Application for License as a Cigarette Agent and an Application for License as a Wholesale Dealer of Cigarettes. The applications were complete, but Allied responded "No" to the question asking if the applicant had been convicted of a crime in the past five years. On August 18, 1988, the Division of Taxation issued to Allied a Notice of Proposed Refusal to Relicense as a Cigarette Agent/Wholesale Dealer. A letter accompanying the notice explained that the decision to refuse licenses to Allied was based upon Allied's pleas of guilty to violations of section 484(a)(1) of the Tax Law.

Denial of a wholesale dealer's license and a cigarette stamping agent's license will cause Allied to lose sales in all areas of its business operations. Allied's customers purchase not only cigarettes, but also candy and other grocery items, from Allied. They can reasonably be expected to turn to other suppliers if Allied is no longer able to sell cigarettes. Allied's comptroller estimated that Allied's annual gross profits will be reduced by at least \$578,000.00, if Allied is not able to provide its customers with cigarettes.

OPINION

In the determination below the Administrative Law Judge decided that (1) the Commissioner of Taxation and Finance (hereinafter the Commissioner) was not required to issue licenses to all existing licensees without any exercise of discretion; (2) both the language of the statute and the legislative history indicate that Tax Law § 480(2) was intended to apply retroactively; (3) Tax Law § 480 is not an ex post facto law; (4) the application of the amended statute does not affect a vested right and is rationally related to a legitimate government purpose such that no violation of due process of law has occurred; (5) the Commissioner did not abuse his discretion in imposing a 30 day suspension by limiting his consideration to the nature, number and degree of violations; and (6) the Division of Tax Appeals is without authority to declare an act of the Legislature unconstitutional and it is presumed that statutes in general, and Chapter 860 of the Laws of 1987 in particular, are constitutional.

On exception petitioner contends that the Administrative Law Judge erred (1) in concluding that the Commissioner was not compelled to automatically reissue petitioner's licenses; (2) in concluding that the Legislature intended that Tax Law § 480(2)(b) be applied retroactively and in finding that the Commissioner was permitted to apply the licensing guidelines retroactively; (3) in finding that the denial of petitioner's licenses did not violate the ex post facto clause of the United States Constitution; (4) in finding such denial consonant with due process; (5) in finding that the application of the statute to petitioner did not violate the commerce clause; and (6) in failing to conclude that the Commissioner abused his discretion in suspending petitioner for the 30 day maximum period and refusing to reissue petitioner's licenses.

In response the Division argues that (1) the amended licensing provisions of Tax Law § 480 do not mandate automatic issuance of new licenses to cigarette tax agents and wholesale dealers holding such licenses on the effective date of the amendment; (2) the proposed refusals to license petitioner are not a retroactive application of law; (3) the proposed refusals to license petitioner do not violate the due process or ex post facto clauses of the United States Constitution; and (4) neither the Cigarette Marketing Standards Act nor the licensing provisions of Tax Law § 480 violate the commerce clause.

We affirm the determination of the Administrative Law Judge.

In 1939, New York State first imposed a tax on cigarettes possessed for sale in the state (Tax Law Article 20). Liability for collection and payment of the tax was placed on the cigarette agent, who paid the tax either by purchasing stamps or through the use of a metering machine; the amount of the tax was passed through from the agent or dealer to the ultimate consumer of the cigarettes (Tax Law § 471).

Wholesale dealers in cigarettes were required to be licensed by the State Tax Commission (now, the Commissioner), but cigarette agents were not subject to licensing requirements. No licensing fee was imposed. Once obtained, a license remained in effect until revoked or suspended for cause or surrendered. A violation of any provision of Article 20 or the regulations

issued thereunder constituted "cause" to refuse to issue or to suspend or revoke a license. A wholesale dealer could not sell cigarettes without a license, and agents were forbidden to sell cigarettes to unlicensed dealers (Tax Law § 480).

In 1985 the Legislature amended the Tax Law by the adoption of Article 20-A, commonly referred to as the Cigarette Marketing Standards Act (CMSA) (L 1985, ch 897, eff September 1, 1985). The purposes of CMSA are set forth in the legislative findings.

"The legislature hereby finds that it is necessary to regulate and control the sales price of cigarettes within the state at the wholesale and retail levels for the purpose of stabilizing the cigarette industry in New York state. The legislature finds that predatory pricing by cigarette dealers from states surrounding New York has contributed to the destruction of the price structure in New York state. Those dealers, who are protected in the home states by cigarette sales price laws similar to that contained in this act have had an unfair advantage over New York cigarette dealers. This act is enacted by the legislature to prevent the movement of the cigarette distribution industry outside of New York, with the loss of jobs attendant to such a move and to prevent the sale of untaxed cigarettes and the evasion of state and local cigarette and sales taxes" (L 1985, ch 897, § 1).

CMSA established minimum percentage markups to be used by wholesale dealers and retailers in determining the minimum price of cigarettes, and it made it illegal for a wholesale dealer or retailer to sell cigarettes in New York at less than the minimum price (Tax Law §§ 484[a][1], [2] and [3]). The statute also provided civil penalties for the violation of acts proscribed by CMSA.

"The license of any wholesale dealer who violates any of the provisions of this article shall be suspended, after due notice and opportunity of hearing, for a period of not less than five days nor more than thirty days for a first offense, and shall be revoked for a second offense" (Tax Law § 484[a][4]).

A violation of Article 20-A constituted a class B misdemeanor (Tax Law § 1829). This was the state of the law at the time that Allied entered its guilty pleas to five counts of violating § 484(a)(1) in January 1987.

From the onset of the CMSA pricing structure, complaints were heard from both wholesale dealers and retailers subject to its strictures. These complaints generally fell into two categories. First, some agents, wholesale dealers and food merchants charged that some members of the industry were taking advantage of the minimum pricing scheme by giving illegal rebates to retailers and thus taking accounts from wholesalers who refused to rebate illegally. Second, smaller retailers and subjobbers complained that the chain store provision of CMSA favored large retail chains over other retailers (Letter from Roderick G.W. Chu, Commissioner of Taxation and Finance, to the Honorable Mario M. Cuomo, [July 17, 1987], Governor's Bill Jacket, L 1987, ch 860). After much debate, a bill was passed to remedy the perceived inequities of CMSA and to increase compliance with the cigarette tax imposed under Article 20 (Governor's Memorandum of Approval of Chapter 860 of the Laws of 1987 [December 23, 1987], Governor's Bill Jacket, supra).

Chapter 860 of the Laws of 1987 revised CMSA and Article 20 by, among other things, shrinking the margins between wholesale purchase prices and minimum selling prices under CMSA, expanding the definition of "chain store" and extensively revising the licensing provisions found in Article 20.

Section 472 of the Tax Law was amended to require licensing of cigarette agents, and a license application fee of \$1,500.00 was imposed (L 1987, ch 860, § 1). Section 2 of Chapter 860 amended the licensing provisions of Tax Law § 480. An application fee of \$1,500.00 is now imposed for a wholesale dealer's license (Tax Law § 480[1]). As under prior law, once granted "a license shall continue in effect until revoked or suspended for cause or surrendered", except as provided in Tax Law § 480(4) (Tax Law § 480[1]). Subdivision 4 of section 480 provides:

"If the commissioner of taxation and finance considers it necessary for the proper administration of the cigarette tax imposed by this article or the cigarette marketing standards contained in article twenty-A of this chapter he may require every person under this article who holds a license to file a new application for a license in such form and at such time as the commissioner may prescribe and to surrender such license. The commissioner may require such

filing and such surrender not more often than once every three years. Upon the filing of such application with the proper fee and the surrender of such license, the commissioner shall issue, within such time as he may prescribe, a new license to each applicant."

Section 15 of Chapter 860 provides: "The commissioner of taxation and finance shall relicense and reregister agents, wholesale dealers and chain stores before April first, nineteen hundred eighty-eight." This date was later changed to August 1, 1988 (L 1988, ch 4, § 5). Thus, the amended statute required all licensed wholesale dealers to surrender their licenses and file new applications for licenses, and it also directed the Commissioner to relicense such dealers by the statutory deadline.

Chapter 860 substantially revised the standards to be applied by the Commissioner in determining whether to issue a license. The Commissioner may refuse to issue a license where it has been ascertained that (1) any tax imposed under the Tax Law or a related statute has been finally determined to be due from the applicant or a controlling person and has not been paid in full (Tax Law § 480[2][a]); (2) the applicant or a controlling person has been convicted of a Tax Law crime within the preceding five years (Tax Law § 480[2][b]); (3) the license of the applicant has been cancelled or suspended within the preceding five years (Tax Law § 480[2][d]); (4) the applicant or the controlling person was the controlling person in another wholesale dealer when one of the first three enumerated acts occurred (Tax Law § 480[2][c]); (5) any controlling person of the applicant has committed any of the specifically enumerated acts which form a basis for cancellation or suspension of a license under Tax Law § 480(3) (Tax Law § 480[2][e]).

Section 6 of Chapter 860 renumbered and amended Tax Law § 484(a)(4) (now Tax Law § 484[a][5]) to include within its scope agents as well as wholesale dealers.

The first issue which we will address is petitioner's claim that the Commissioner was compelled to reissue petitioner a license. In support of this claim petitioner relies upon § 15 of Chapter 4 of the Laws of 1988 which states in part that "the commissioner . . . shall relicense and reregister agents [and] wholesale dealers . . . before August first, nineteen hundred eighty-eight".

Specifically, petitioner asserts that this language requires a mandatory relicensing without any discretion on the part of the Commissioner. We disagree.

Petitioner's interpretation of the language quoted above would have us define the term "relicense" in a manner which renders the action required by the Legislature useless. Petitioner argues that "relicense" as used in § 15 of Chapter 4 of the Laws of 1988 merely means the Commissioner must give a license to anyone who held a valid license. Such a purposeless result should not be given to the words used in the statute if they can reasonably be interpreted in a useful manner and courts will not impute such a futile or frivolous intent to the Legislature when a practical construction exists (McKinney's Statutes § 141). We find the meaning of "license" as used in the Tax Law to call for a different result. In Tax Law § 480 the discretionary nature of the licensing process by the Commissioner is evident, as the power to refuse, cancel or suspend a license based on certain grounds is vested in the Commissioner (Tax Law § 472; Tax Law § 480[2]; Tax Law § 480[3]). To disregard the Commissioner's discretionary power as given by the Tax Law in order to reach a purposeless result is clearly contrary to the intent of the Legislature. Further, it would be incongruous and contrary to the legislative purpose, which is to provide for a licensing system which increases compliance with the CMSA, to read the statute as precluding the Commissioner from refusing a license because the acts constituting the basis for the denial occurred prior to the amendment at issue and were committed by a person who already held a license, rather than an individual who was applying for his first license. Accordingly, we find that the term "relicense" as used in § 15 of Chapter 4 of the Laws of 1988 encompasses the licensing process as described in the Tax Law with all the accompanying elements of discretion.

The next issue which we will address is petitioner's claim that the denial of its license violates the ex post facto prohibition or guarantees of due process of law. An ex post facto law is one which imposes punishment on an act not punishable when committed or one which imposes a greater penalty on the offender than the penalty imposed when the offense was committed (Weaver v. Graham, 450 US 24, 28-29). The constitutional ban on the enactment of ex post

facto legislation traditionally applies only to criminal statutes (see, Ames v. Merrill Lynch, Pierce, Fenner & Smith, 567 F2d 1174, 1179). However, it may apply to civil penalties which are so punitive in nature as to amount to criminal penalties in disguise (Louis Vuitton S.A. v. Spencer Handbags Corp., 597 F Supp 1186, 1194, affd 765 F2d 966). Allied argues that since its convictions for violating Tax Law § 484(a)(1) occurred before the effective date of the amended licensing provisions, a refusal to license Allied as either an agent or a wholesale dealer amounts to an impermissible additional penalty. This is not the case.

The purpose of Tax Law § 480 is to regulate the cigarette industry, in part, by granting the Commissioner the authority to prohibit persons who have violated the Tax Law from obtaining licenses as agents or wholesale dealers. It is not intended to punish for past activity but to regulate a present situation. A law which prescribes the qualifications of persons who are to discharge certain duties is not an ex post facto law despite the fact that it may deny an office or a license to a person on the basis of a criminal conviction occurring before the effective date of the licensing statute (De Veau v. Braisted, 363 US 144, 160; Matter of Springer v. Whalen, 68 AD2d 1011, 1012; Guido v. Melton, 107 Misc 2d 660, 435 NYS2d 677). As a result, we conclude that the statute at issue is not an ex post facto law. Having determined that Tax Law § 480 is not an ex post facto law, it is next necessary to consider whether its application to Allied offends due process.

Although there is no absolute constitutional ban on legislation which reaches back to establish the legal significance of acts occurring before the enactment of such legislation, legislation which is unduly harsh or oppressive may violate due process guarantees (see, Canisius College v. United States, 799 F2d 18, 25; Matter of Hodes v. Axelrod, 70 NY2d 364, 520 NYS2d 933). Among the factors to be considered in determining whether retroactive application of a statute is harsh and oppressive is whether it abrogates a vested right (Canisius College v. United States, supra, at 25). A license is a statutory creation and as such is subject to reasonable regulation and restriction. "The State may change the right to hold a license which it has granted

or the conditions under which it may be held. Such a right is not a vested right" (Matter of Lap v. Axelrod, 95 AD2d 457, 459, 467 NYS2d 920, 922).

Another factor to consider is the public policy to be served by the legislation (see, Matter of Hodes v. Axelrod, supra). The purpose of the revisions of Articles 20 and 21-A was to increase compliance with the cigarette tax and CMSA (Governor's Memorandum of Approval, supra). The statute sought to achieve this end, in part, by directing: (1) the surrender of all existing wholesale dealer's licenses and (2) the licensing of agents and relicensing of wholesale dealers in light of the new provisions of Tax Law § 480(2) (Tax Law § 480[4]; L 1987, ch 860, § 15 as amended by L 1988, ch 4, § 15). The application of the new provisions to all applicants, whether they previously held licenses or not, is rationally related to the legislative purpose of the amended statute, and it results in equal treatment of all applicants. In sum, since application of the amended statute to Allied does not affect a vested right and is rationally related to a legitimate government purpose, there has been no violation of Allied's right to due process of law.

The next issue which we will address is petitioner's claim that CMSA as applied violates the commerce clause of the United States Constitution. We conclude that the CMSA as applied does not violate the commerce clause. Petitioner's argument that the statute in question is unabashedly protectionist in that it has no underlying valid purpose is not persuasive. As support for its contention, petitioner relies in part upon statements of the Legislature that predatory pricing by cigarette dealers from states surrounding New York has contributed to the destruction of the price structure in New York State and that the CMSA was enacted to prevent the movement of the cigarette distribution industry outside of New York (L 1985, ch 897, § 1). While these statements reflect a part of the intent of the Legislature in its enactment of the CMSA, they do not provide any evidence in support of petitioner's contention that the CMSA as applied violates the commerce clause. In fact, petitioner has provided no evidence or argument at all that the CMSA as applied violates the commerce clause. Petitioner has categorized its

argument as one addressing the application of the CMSA, however, the argument itself merely attacks some of the legislative intent and it speculates as to potential abuse of the statute. The Division of Tax Appeals is without authority to declare an act of the Legislature unconstitutional on its face (Califano v. Sanders, 430 US 99, 109; Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). Further, it is presumed that statutes in general and Chapter 860 of the Laws of 1987 in particular are constitutional.

The last issue which we will address is petitioner's claim that the Commissioner acted in an arbitrary and capricious manner by refusing to relicense petitioner and imposing the 30-day maximum suspension for petitioner's violations of Tax Law § 484(a)(1). While it appears that the issue with regard to the suspension of petitioner's license is moot in light of our conclusion that the Commissioner may properly deny petitioner's license applications, we nonetheless conclude that the maximum suspension was a proper exercise of the Commissioner's discretion. Petitioner's contention is centered around the fact that it appears that the only factors considered in refusing to relicense and imposing the suspension were the convictions themselves. While the Commissioner may be found to have abused his discretion where he acts in an arbitrary and capricious manner (Matter of Sapolin Paints v. Tully, 55 AD2d 759, 390 NYS2d 220), we conclude that he did not abuse his discretion in the present case. We find that the fact that the Commissioner considered the nature, number and degree of violations by petitioner to be an adequate basis for the refusal to relicense and the imposition of the 30-day suspension.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Allied Grocers Cooperative, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Allied Grocers Cooperative, Inc. are denied;
4. The Notice of Proposed Suspension of License as a Wholesale Dealer of Cigarettes issued on December 4, 1987 is sustained; and

5. The Notice of Proposed Refusal to Relicense as a Cigarette Agent/Wholesale Dealer issued on August 18, 1988 is sustained.

DATED: Troy, New York
November 30, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner