STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PETRO ENTERPRISES, INC. F/K/A DAN'S GROCERY CORPORATION	:	DECISION DTA No. 806301
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period December 1, 1984 through April 30, 1987.	:	

Petitioner Petro Enterprises, Inc., f/k/a Dan's Grocery Corp., 63 Richfield Street, Lockport, New York 14094 filed an exception to the determination of the Administrative Law Judge issued on January 25, 1991 with respect to its petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period December 1, 1984 through April 30, 1987. By decision dated September 19, 1991, the Tax Appeals Tribunal remanded the matter for further proceedings with respect to one issue, but retained jurisdiction over the filed exception. On March 5, 1992, the Administrative Law Judge issued a determination on remand. Petitioner filed an exception to the determination on remand. Both exceptions will be decided by this decision. Petitioner appeared by Robert A. Zucco, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner did not file a brief on either exception. The Division of Taxation filed a letter in opposition to both exceptions. Petitioner's request for oral argument on each exception was denied.

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

ISSUES

I. Whether a grade of kerosene, known as "K-1," constituted a diesel motor fuel under Tax Law former § 282-a.

II. Whether, as a result of an audit, the Division of Taxation properly determined additional diesel motor fuel tax due.

III. Whether petitioner was the subject of unconstitutional selective enforcement of the tax laws.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in the initial determination and in the determination on remand, except that we have deleted finding of fact "5" in the Administrative Law Judge's determination on remand[1] and we have made additional findings of fact. The Administrative Law Judge's findings of fact, with the exception of finding of fact "5" in the determination on remand, and the additional findings of fact are set forth below.

On July 31, 1987, following an audit, the Division of Taxation (hereinafter the "Division") issued to petitioner,[2] Dan's Grocery Corp., Thrifty Oil Division, a Notice of Determination of Tax Due under Article 12-A of the Tax Law which assessed $54,868.67 in tax due, plus penalty and interest, for the period December 1, 1984 through April 30, 1987.

During the period at issue, petitioner, doing business under the name "Thrifty Oil", was engaged in the retail sale[3] of various petroleum products, including gasoline, diesel fuel, fuel oil, and kerosene. Petitioner was registered as a distributor of diesel motor fuel. Most of petitioner's fuel oil and kerosene sales were made by home delivery. Petitioner's facility was located at 63 Richfield Street, Lockport, New York and consisted of an oil tank farm and a retail service station. The retail station had a number of islands containing metered pumps through which product was sold to customers. One such island contained two metered pumps each designated

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[1]We deleted the Administrative Law Judge's finding of fact "5" in the determination on remand, which concluded that petitioner had failed to prove any of the factual allegations concerning the claim of selective enforcement, because it is unnecessary to our conclusion in this opinion.

[2]Petitioner subsequently changed its name to Petro Enterprises, Inc., and, in fact, filed its petition under its new name, but has continued to conduct business under the name "Thrifty Oil."

[3]As used in this finding, retail sale refers to sales to ultimate consumers and not to the definition of "retail sale" contained in Tax Law former § 282-a.

"Diesel". These pumps were connected to an underground storage tank. This tank was supplied with product from petitioner's tank farm by petitioner's home heating oil delivery trucks. Another island contained a single metered pump which bore the designation "Fuel Oil" and indicated thereon "For Home Heat Only". This pump was fed directly from one of petitioner's large "tank-farm" oil tanks. Petitioner also had a metered pump through which petitioner sold a grade of kerosene, known as K-1. This kerosene pump was fed by an above-ground 10,000 gallon tank. The kerosene pump bore a sign which stated: "Not For Use In A Diesel Motor Vehicle."

All of petitioner's metered pumps were self-service and all were accessible to motor vehicles. All pumps were electronically connected to a console controlled by petitioner's cashier. The cashier, stationed in a small building nearby, could observe all activity at the pumps, and could, by operating the console, turn off any of the pumps at any time.

The product sold through the pumps designated "Diesel" and "Fuel Oil" was identical during warm weather months. In colder weather, the product sold through the "Diesel" pumps was blended with an additive by petitioner to prevent the product from gelling.

Petitioner collected and remitted tax due under Article 12-A with respect to sales made through the pumps designated "Diesel". Petitioner did not collect tax under Article 12-A with respect to any sales made through the fuel oil or kerosene pumps.

On audit, the Division reviewed petitioner's purchase and sales records. Based upon its review of such records, the Division concluded that petitioner properly collected and reported diesel motor fuel tax with respect to substantially all of the 226,284 gallons of fuel sold through the pumps designated diesel. The Division also reviewed invoices documenting residential fuel sales and concluded that petitioner had sufficiently documented sales of diesel fuel by home delivery (such sales being for home heating purposes and thus not subject to tax under Article 12-A). With respect to sales made through the fuel oil and kerosene pumps, the Division requested documentation of specific sales. Petitioner did not maintain documentation of any specific sales. Petitioner did maintain daily pump readings which showed daily totals of gallons

sold through each pump. The Division concluded that, in the absence of documentation of specific nontaxable sales, all sales through the fuel oil and kerosene pumps were properly subject to diesel motor fuel tax. The Division used petitioner's records of daily pump readings and determined that petitioner sold 210,389 gallons of fuel oil and 337,978 gallons of kerosene during the audit period. The Division assessed diesel motor fuel tax of ten cents per gallon on these sales and issued the assessment in dispute herein.[4]

Petitioner conceded that fuel oil and kerosene were sold in the total amounts determined by the Division, but took the position that all such sales were nontaxable under Article 12-A.

Petitioner's retail station was open from 7:00 A.M. to 7:00 P.M.

As noted previously, petitioner's kerosene pump sold K-1 kerosene. This grade of kerosene has a low sulphur content and is cleaner burning than regular kerosene. K-1 kerosene is commonly used in space heaters.

Petitioner sold some amount of kerosene and fuel oil from the pumps in question which was dispensed into portable containers.

In addition to the facts found by the Administrative Law Judge, we find the following:

> Petitioner stated in its petition that "[t]he taxpayer has been the subject of arbitrary, capricious, and unlawful selective enforcement. No other taxpayers who follow the same procedure as the Petitioner herein with respect to sales of home heating oil and kerosene have been subjected to audit and assessment" (Exhibit B, petition). At the hearing, petitioner's representative asked the Division's auditor: "Did you for this period in question conduct any other audits in the area, Niagara County, Erie County, of this type of situation, selling---." The question was interrupted by the Division's objection on the grounds of relevancy. The Administrative Law Judge addressed this objection by opining, in part: "I don't want to get into whether the Department failed to proceed against other taxpayers who may have improperly failed to pay tax or not . . . I don't think that this notice is in any way affected by whether or not other taxpayers in this area were either properly or improperly conducting their business." The Administrative Law Judge ultimately sustained the objection.
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> The Administrative Law Judge's ruling and statements precluded petitioner from attempting to introduce any evidence of selective enforcement.

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[4]The Division also assessed $31.97 in tax on petitioner's underreporting with respect to 319.7 gallons of fuel sold through the "Diesel" pumps during the audit period. This part of the assessment was not contested.

On petitioner's initial exception, the Tax Appeals Tribunal held that the Administrative Law Judge erred in preventing petitioner from introducing evidence with respect to the claim of selective enforcement and remanded the matter to the Administrative Law Judge for a further hearing on this issue. Because the hearing on remand could not be scheduled in Buffalo, petitioner elected to submit affidavits rather than attend a hearing in Troy.

FINDINGS OF FACT ON REMAND

With respect to the issue on remand, petitioner submitted affidavits of Daniel J. Zucco and Andrew A. Zucco, each sworn to on November 19, 1991. Daniel J. Zucco is petitioner's president. Andrew A. Zucco is employed by petitioner. His duties include accounting and bookkeeping.

In response to petitioner's submission of affidavits, the Division of Taxation submitted the affidavit of Arthur J. Maloney, sworn to on January 21, 1992, and the affidavit of Richard LeMaster, sworn to on January 28, 1992. During the period at issue, Mr. Maloney was employed by the Division as a Tax Auditor II and was the supervisor of the Excise Tax program in the Division's Buffalo District Office. Mr. Maloney supervised the audit in question. During the period at issue, Mr. LeMaster was employed by the Division as a Tax Auditor I. Mr. LeMaster conducted the audit in question.

In response to the Division's submissions, petitioner submitted an additional affidavit from Andrew A. Zucco, sworn to on February 6, 1992.

No hearing was held in respect of the issue on remand and therefore no testimony was taken. The decision to submit affidavits in lieu of a hearing was made by petitioner.

SUMMARY OF FACTUAL ALLEGATIONS ON REMAND

In his affidavit, Daniel J. Zucco alleged the following:

(a) That in June 1988 he visited five retail gasoline stations in the western New York area and that each such station sold home heating oil through metered pumps.

(b) That no diesel motor fuel tax was charged or collected with respect to fuel sold through such pumps.

(c) That he, along with an employee, purchased home heating oil through such pumps which was dispensed into a five-gallon container and that, upon paying for the product, received a receipt.

(d) That none of the receipts received in connection with such purchases was endorsed with language "not to be used in the operation of a motor vehicle" nor was the purchaser required to provide his name and address.

(e) That Mr. Zucco contacted approximately 10 other businesses in western New York engaged in the sale of home heating oil through metered pumps and inquired as to whether such businesses had ever been audited or required to pay diesel fuel tax on the retail sale of home heating oil in small quantities.

(f) That all such businesses responded that they had never been audited and had never paid tax on such sales.

(g) That, despite the foregoing, petitioner was singled out for audit and had tax imposed upon it when petitioner's competitors were free from audits and were not required to collect and pay taxes on similar sales.

(h) That the auditor, Mr. Richard LeMaster, requested access to petitioner's records concerning the mileage of petitioner's diesel trucks in order to conduct an audit of the form MT-104's filed by the corporation covering the tax paid for the fuel used by those trucks.

(i) That, during the course of the audit, Mr. LeMaster acted in an unprofessional manner, and, following such conduct, Mr. Zucco advised Mr. LeMaster that he wished to consult with his lawyer regarding the audit.

(j) That in response to Mr. Zucco's statement, Mr. LeMaster stated words to the effect that Mr. Zucco did not need a lawyer and that a lawyer would only make things more difficult.

(k) That Mr. LeMaster further stated words to the effect that "I don't know what it is with you Italians. You're always running to get a lawyer. Now I find out the lawyer is just another member of your family. It's always a family thing with you people."

(l) That following these remarks Mr. LeMaster requested all corporate records and stated that he was now going to conduct a detailed audit of all corporate taxes.

(m) That Mr. LeMaster conducted a detailed audit "as he had never done before in the western New York area" because he harbored ethnic biases against Italian-Americans and because he wished to punish petitioner for seeking the assistance of legal counsel.

As noted, petitioner also submitted an affidavit of Andrew Zucco dated November 19, 1991. The allegations set forth in this affidavit were consistent with those set forth in the David Zucco affidavit.

In his affidavit submitted by the Division in response, Mr. Maloney alleged the following:

(a) That the audit in question was assigned to the Division's Buffalo District Office by the Division's Central Office in Albany in February 1987 as part of the normal routine of the Buffalo District Office.

(b) That the audit in question was one of 77 highway use tax audits assigned to the Buffalo District Office along with their respective diesel motor fuel and corporation tax audits at that time.

(c) That Mr. Maloney assigned particular cases to individual auditors.

(d) That in 1987 the excise tax program was responsible for 11 western New York counties as well as out-of-state audits and that the excise tax section conducted audits under Tax Law Articles 9, 12-A, 13-A, 18, 20, 21, 28 and 29.

(e) That the audit issues in the instant matter were common and were addressed in the same manner as similar audits conducted by the Buffalo District Office during the period at issue.

In his affidavit, also submitted by the Division in response, Mr. LeMaster alleged the following:

(a) That the audit in question was assigned to Mr. LeMaster by Mr. Maloney and that Mr. LeMaster had no part in the assignment process.

(b) That he reviewed the November 19, 1991 affidavit of Daniel Zucco and that he denied the actions and statements attributed to him in that affidavit (which actions and statements are summarized above).

(c) That he specifically denied having made any remarks that would constitute ethnic slurs and that he has no bias against Italians or any ethnic group.

(d) That both he and his wife are of Italian heritage.

(e) That the audit was conducted in a professional manner; that the books and records requested were necessary to conduct a proper audit; and that he has conducted many detailed audits similar to the audit herein.

As noted, in response to the Division's submission of affidavits, petitioner submitted an affidavit of Andrew A. Zucco, sworn to on February 6, 1992, wherein Mr. Zucco alleged the following:

(a) That upon Mr. LeMaster's arrival, Mr. LeMaster stated he wished to conduct a highway use tax audit and that he did not mention any other taxes or returns at that time.

(b) That only following the alleged incidents involving Daniel Zucco and the auditor (described above) did Mr. LeMaster announce that the audit would include diesel fuel tax.

(c) That no corporation tax audit of petitioner was ever conducted.

In addition to the facts found by the Administrative Law Judge, we find the following:

> In a letter dated January 2, 1992 to petitioner's representative, the Administrative Law Judge acknowledged that he had granted an extension to the Division's representative to file reply affidavits through an improper procedure, i.e., he granted the Division's oral request without inquiring whether the Division had contacted petitioner's representative. The Administrative Law Judge also stated that he did not believe that the improper procedure should result in the denial of the Division's request because the delay was reasonable in length, the reply affidavits would make the record more complete and no prejudice would result to petitioner from the extension.

OPINION

In the initial determination, the Administrative Law Judge held that K-1 kerosene was diesel motor fuel within the meaning of Tax Law former § 282-a. Further, the Administrative

Law Judge concluded that petitioner did not prove that all of its kerosene and fuel oil sales were not retail sales. The Administrative Law Judge noted that petitioner did prove that it made some nontaxable sales but that petitioner failed to identify specific nontaxable sales. In addition, the Administrative Law Judge rejected petitioner's contention that it was not required to keep records of these sales.

In its first exception, petitioner asserts that K-1 kerosene is not "commonly used in the operation of an engine of the diesel type" and, thus, is not diesel motor fuel within the meaning of Tax Law former § 282-a. Petitioner also contends that it was not required to keep records of the fuel sold through the K-1 and the "home heating only" dispensers and that it did prove that these sales were not retail sales through the evidence that it offered. Finally, petitioner asserts that the Administrative Law Judge erred in not addressing petitioner's claim that the record keeping regulation at 20 NYCRR 420.8(d) is arbitrary, capricious and unreasonable.

In response, the Division asserts that the Administrative Law Judge was correct in not addressing certain allegations made by petitioner in its petition because petitioner did not prove these allegations at the hearing.

In the determination on remand, the Administrative Law Judge concluded that petitioner had failed to prove either of the two required elements necessary to establish a claim of unconstitutional selective enforcement. First, the Administrative Law Judge concluded that petitioner had not proved, even if all its allegations on this point were accepted as fact, that it was singled out for audit. The Administrative Law Judge held that the fact that up to 15 similar businesses in Western New York had not been audited did not prove that petitioner was singled out for audit. The Administrative Law Judge also held that since petitioner did not establish that the audit was initially limited in scope to the highway use tax, it failed to prove its assertions that the audit was extended to include the diesel motor fuel tax and that this extension was the result of an unfair application of the law. With respect to the second element of unconstitutional selective enforcement, the Administrative Law Judge concluded that petitioner's evidence, submitted in the form of affidavits from two interested individuals (an officer and an employee of

petitioner) was not sufficient to show an intentional, invidious plan of discrimination on the part of the Division.

In its exception to the determination on remand, petitioner argues that the Administrative Law Judge erred in weighting the use of affidavits against petitioner, since it was the Administrative Law Judge's erroneous ruling at the initial hearing that precluded petitioner from presenting the testimony through witnesses at the initial hearing. Petitioner asserts that it was unable to meet the expense of attending the hearing on remand scheduled in Troy, New York and, thus, requested permission to submit the case on affidavits. Petitioner also alleges that the Administrative Law Judge engaged in ex parte communications with the Division's counsel and granted an extended period of time in which to submit affidavits.

In response, the Division argues that the Administrative Law Judge acted reasonably in granting the Division an additional period of time in which to submit affidavits and that petitioner has not shown that it was prejudiced by the delay. The Division also contends that the Administrative Law Judge properly decided that petitioner had not proved the claim of unconstitutional selective enforcement.

Turning first to petitioner's claim of unconstitutional selective enforcement, we agree with the Administrative Law Judge that petitioner has not proved its claim, even if all of petitioner's allegations are accepted as fact.

Petitioner's investigation indicating that 15 other establishments were not audited simply does not prove that the Division did not perform similar audits of other businesses similarly situated to petitioner (cf., Matter of Di Maggio v. Brown, 19 NY2d 283, 279 NYS2d 161 [where it was a stipulated fact that penalty provisions of a statute prohibiting strikes by public employees had never, with two exceptions, been enforced over a twenty year period]). Thus, petitioner has not established that it was the subject of selective enforcement of the Tax Law. Since petitioner has not established that the Division did engage in the selective enforcement of the Tax Law, we have no basis to consider the second element of the claim, i.e., that the selective enforcement was the result of an intentional and invidious plan of discrimination on the part of the Division (see,

Matter of G & B Publ. Co. v. Department of Taxation & Fin., 57 AD2d 18, 392 NYS2d 938, 940, lv denied 42 NY2d 807, 398 NYS2d 1029).

Given our conclusion that petitioner's allegations are insufficient on their face to establish a case of selective enforcement, we conclude that petitioner was not prejudiced by the Administrative Law Judge's decision to grant the Division an extension within which to file affidavits in opposition. Even if the Division's affidavits are not considered, petitioner's evidence is insufficient. Therefore, though the Administrative Law Judge, as he acknowledged in his letter to petitioner of January 2, 1992, erred in engaging in an ex parte discussion with the Division's representative, this error did not in any way disadvantage petitioner's case. Similarly, we do not see that petitioner was disadvantaged by the submission of its evidence on selective enforcement through affidavits, since the facts alleged in the affidavits are insufficient to establish its claim.

Turning to petitioner's substantive claims, we agree with the Administrative Law Judge that the testimony of petitioner's president was not sufficient to prove that K-1 kerosene could not be used in a diesel engine and, therefore, that petitioner did not establish that K-1 kerosene was not diesel fuel under former section 282-a of the Tax Law.

Petitioner's next point is that it was not required to keep detailed records of each and every sale and that it was entitled to meet its burden of proof through other types of evidence. Without accepting petitioner's interpretation that former section 286(1) of the Tax Law did not require petitioner to keep sales records, we agree with petitioner that it was possible for petitioner to satisfy its burden of proof with evidence other than sales records. However, we see no basis for modifying the Administrative Law Judge's conclusion that the testimonial evidence offered by petitioner was not sufficiently persuasive to sustain petitioner's burden of proof.

With respect to petitioner's contention that the Administrative Law Judge erred in not addressing petitioner's claim that the Division's record keeping regulation, former 20 NYCRR 420.8(d), was in conflict with former section 286(1), we conclude that it is not necessary to address, nor decide this issue. This case has been decided on the ground that petitioner failed to prove a specific amount of nontaxable sales, through any type of evidence, not on the ground that

petitioner failed to comply with the record keeping regulation. Therefore, we conclude that the correctness of the regulation is not in issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Petro Enterprises, Inc. f/k/a Dan's Grocery Corporation are denied;
2. The determinations of the Administrative Law Judge are affirmed;
3. The petition of Petro Enterprises, Inc. f/k/a Dan's Grocery Corporation is denied; and
4. The Notice of Determination dated July 31, 1987 is sustained.

DATED: Troy, New York
October 15, 1992

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

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

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