STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RALLY OIL COMPANY, INC.	:	DECISION
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period January 1, 1984 through December 31, 1985.	:	

The Division of Taxation filed an exception to the order of the Administrative Law Judge issued on April 5, 1990 granting petitioner's motion for discovery (File No. 806712).

Petitioner appeared by Levine, Robinson, & Algios, P.C. (Kenneth L. Robinson, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in response.

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

ISSUE

Whether the Administrative Law Judge properly granted portions of petitioner's motion for discovery of documents from the Division of Taxation.

FINDINGS OF FACTS

We find the following facts.

On March 28, 1989, the Division of Tax Appeals acknowledged receipt of a petition filed as a result of the issuance of a Notice of Determination of Tax Due under the Motor Fuel Tax Law. On September 22, 1989, the Division of Taxation filed an answer to the petition. Subsequently, petitioner, by its attorneys, Levine, Robinson and Algios, P.C., filed a reply on or about January 11, 1990.

On January 25, 1990, petitioner served a Demand for a Bill of Particulars on the Division. In paragraph "9" of the Demand, petitioner requested the Division to:

> "Identify each notice of deficiency, tax warrant or similar document, issued by the Department to one or all of Rally's suppliers referring or relating to the sale of gasoline to Rally or to Rally's suppliers that is at issue in this proceeding."

On or about February 2, 1990 the Division served its Bill of Particulars on petitioner. With respect to paragraph "9" of the Demand, the Division responded in part:

> "This is a matter for discovery."

On January 29, 1990, the Division of Tax Appeals received a motion and supporting affidavit dated January 25, 1990 for leave to file requests for the production of documents and notices of depositions upon employees of the New York State Department of Taxation and Finance prior to a hearing.

At paragraph "11" the affidavit sought review of the following:

> "(a) All documents referring or relating to the purchase, sale, resale, transportation, throughputting, terminalling, storage, delivery, importation, exportation or other use of gasoline by Rally's Suppliers[1] during the period December 1, 1983 through July 1, 1985 (the "Relevant Period");
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> "(b) All documents referring or relating to the sale, resale, exchange, delivery or transportation of gasoline by any person (whether a §282 distributor or not) to Rally's Suppliers during the Relevant Period;
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> "(c) All documents referring or relating to conversations between the Department and Rally's Suppliers, and their officers, employees or agents in connection with the purchase, sale, resale, transportation, throughputting, terminalling, storage, delivery, and/or use of motor fuel, for the Relevant Period;
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> "(d) Any and all assessments, proposed assessments, field notes, audits, and reports made in connection therewith, concerning the purchase, sale, resale, transportation, throughputting, terminalling, storage, delivery and/or use of motor fuel by Rally's Suppliers during the Relevant Period;
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> "(e) All Distributor Reports filed pursuant to Article 12-A of the New York State Tax Law and any accompanying documents filed with the Department by Rally's Suppliers or their suppliers in connection with the purchase, sale, resale, transportation,

[1]The term "Rally's Suppliers" was defined elsewhere in the motion.

throughputting, terminalling, storage, delivery and/or use of motor fuel for the Relevant Period and June 1, 1983 through February 29, 1984 inclusive;

"(f) All documents filed by any person pursuant to Articles 13-A and or 28 of the New York State Tax Law and any accompanying documents filed in connection with the purchase, sale, resale, transportation, throughputting, terminalling, storage, delivery, and/or use of motor fuel, by Rally's Suppliers or their suppliers during the Relevant Period;

"(g) All documents in connection with the purchase, sale, resale, transportation, throughputting, terminalling, storage, delivery, and/or use of motor fuel between Rally and Rally's Suppliers for the Relevant Period;

"(h) All documents made in connection with any pre-assessment conference held concerning the assessment made against Rally in this matter;

"(i) Any analysis(es) by the Department of the assessment made against Rally in this matter, including but not limited to any auditor's reports, worksheets, correspondence and/or memoranda; and

"(j) All other documents evidence and writings which is in the Department's custody concerning the above-captioned matter."

The Division of Taxation responded by its Affidavit in Opposition to the Motion for Discovery which was received by the Division of Tax Appeals on February 8, 1990. The Division did not respond to petitioner's request in an item by item manner, but instead asserted generally that the discovery motion was not appropriate because petitioner had failed to establish good cause for the discovery.

OPINION

The Administrative Law Judge ordered the Division of Taxation (hereinafter the "Division") to respond to paragraphs "11(a)", "11(h)" and "11(i)" of petitioner's motion for discovery within 30 days of the date of her order. The Division was also directed to respond to paragraphs "11(b)" and "11(e)", unless it could not determine with relative ease the parties referred to in the request. In the event the Division could not determine the names of the parties, it was given 30 days from the date it was given the names of the parties to respond. Further, the Division was directed to respond to paragraph "11(c)" of the motion for discovery to the extent that it prepared such document in the ordinary course of business and such information was

readily available. The Administrative Law Judge also ordered the Division to respond to paragraph "11(d)" to the extent that the request directly related to fuel provided to petitioner by Rally's suppliers. The requests for discovery pursuant to paragraphs "11(f)" and "11(g)" were denied.

On exception, the Division argues that the Tribunal has jurisdiction over the Administrative Law Judge's order, even though the order does not finally dispose of the matter, and the Tribunal should exercise this jurisdiction because the order would cause an unnecessary and unwarranted expansion of motion practice. The Division asserts that the Administrative Law Judge erroneously granted the motion for discovery without requiring petitioner to prove that it had attempted to obtain the records through more informal means. Finally, the Division argues that the motion for discovery was too broad.

In response, petitioner, citing section 3000.5(a)(5) of the Tribunal's Rules of Practice, argues that the Tribunal does not have jurisdiction over the exception because the order did not finally determine all matters and issues contained in the petition. Petitioner also argues that the Division will not be harmed by complying with the order because the fact that a petitioner must get an order for discovery will protect the Division from unnecessary discovery requests.

We remand this matter for further proceedings before the Administrative Law Judge.

Clearly, our Rules of Practice intend, as a general rule, that the Administrative Law Judge's decisions on motions will not be subject to review until a decision is rendered disposing of the entire petition (see, Matter of Macbet, Tax Appeals Tribunal, June 16, 1988; 20 NYCRR 3000.5[a][5]).[2] It is equally clear, however, that there are instances where exceptions to our general rule may be required (see, Matter of Fisher, Tax Appeals Tribunal, April 19, 1990). We find the instant matter in such disarray that it is impossible to rationally determine whether the general rule or an exception should apply.

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[2]With respect to the appealability of interlocutory orders, our procedure is more like that applicable to the Tax Court, where interlocutory orders are generally not appealable (Internal Revenue Code § 7482[a]; see also, Ryan v. Commr., 517 F2d 13, 75-1 USTC ¶ 9478, cert denied 423 US 892, 46 L Ed 2d 124), than it is like that applicable to the State Courts under the Civil Practice Law and Rules (CPLR 5701[a][2]) where orders are appealable on a number of grounds.

First, we are confronted with petitioner's discovery motion which is so broad that we do not see how the Administrative Law Judge could have determined what the motion encompassed, much less that petitioner demonstrated good cause for the material requested. As stated by the Appellate Division, First Department, the right to discover and inspect documents can only be intelligently adjudicated when the request for discovery is for specifically identified documents (Rios v. Donovan, 21 AD2d 409, 250 NYS2d 818, 823).

In response, the Division's primary argument appears to be that the order should not have been granted because petitioner should have asked the Division for the material. Although we see merit to the Division's argument that informal procedures should be pursued first,[3] we also note that the Division itself directed petitioner to the discovery procedure when petitioner requested certain evidence in a demand for a bill of particulars. It appears that this response of the Division could reasonably have been interpreted by the Administrative Law Judge as meaning that an informal request for evidence would be futile. Further, although the Division has asserted that some of the documents covered by the request would divulge trade secrets of third parties and, thus, would be privileged, the assertion was made only in the most general terms. Such a blanket claim of privilege in opposition to a discovery request is no more tenable than the sweeping discovery request itself (see, City of New York v. M. Paul Friedberg & Assoc., 62 AD2d 407, 404 NYS2d 868, 870).

As a result of the manner in which this matter has proceeded thus far, we find ourselves confronted with many potential, but ill defined issues. Since this is a case of first impression and ostensibly raises important questions with respect both to discovery and the appealability of orders, we are not willing to decide the matter based on the presentation made so far. Accordingly, we remand this matter for the following purpose:

1. Petitioner's motion shall be suspended for 30 calendar days from the date of this decision. During this period, petitioner and the Division will pursue informal means to provide petitioner with evidence relevant to the issues in this matter.

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[3]The Federal Tax Court Rules of Practice specifically direct the parties to utilize informal procedures before resorting to the formal discovery devices provided for by the rules (Tax Court Rule 70[a][1]).

2. If at the end of this 30-day period the parties have not resolved this matter between themselves, petitioner may renew its motion for discovery by filing an amended motion with the Administrative Law Judge within 15 calendar days of the end of the 30-day period. The amended motion shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity.

3. The Division shall serve a written response within 15 calendar days after service of the request and shall state, with respect to each item or category, that inspection will be permitted as requested or state specific reasons why disclosure of the specific item or category should not be allowed.[4]

4. Because this proceeding has already caused a significant delay in the resolution of this case, no extensions shall be allowed of these time periods.

5. The Administrative Law Judge shall issue an order ruling on each contested item or category within 30 calendar days after the Division files its response stating why the Division's objections are or are not sufficient to preclude disclosure.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter be remanded for further proceedings consistent with this opinion.

DATED: Troy, New York
January 17, 1991

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

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

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

[4]We have modeled this procedure after Tax Court Rule 72, which requires the parties to follow this course before a motion for discovery is made to the court.