STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NATIONAL LUBRICANTS, INC. D/B/A AMERICAN CONTINENTAL OIL	:	DECISION DTA No. 807201
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Year 1986.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 29, 1992 with respect to the petition of National Lubricants, Inc. d/b/a American Continental Oil, 141 Milton Street, Buffalo, New York 14210. The Division of Taxation appeared by William F. Collins, Esq. (George Blassman, Esq., of counsel). Petitioner appeared by Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, Esqs. (Lawrence C. Brown, Esq., of counsel).

Both the Division of Taxation and petitioner submitted briefs. The Division of Taxation also filed a brief in response to petitioner's memorandum of law. Oral argument, requested by the Division of Taxation, was heard on July 8, 1993. Petitioner did not appear at oral argument; instead, it submitted a brief in response to the Division of Taxation's oral argument. On November 4, 1993, the Division of Taxation submitted a letter brief in response to petitioner's brief which date commenced the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the tax imposed under Article 13-A of the Tax Law is applicable to petitioner's sales to retail gas stations operated by the Seneca Indians upon the Seneca reservation within the State of New York.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, National Lubricants, Inc., is a New York corporation engaged in the sale and importation of home heating fuel and diesel motor fuel, petroleum products and gasoline as well as the pickup of waste oils. The company was incorporated in New York State in January 1981. Prior to 1985, the company was a lubricating oil business which manufactured,compounded and mixed additives and base oils to produce transmission oils for automobiles. Petitioner discontinued its lubricating business activities and began its current practice of selling and importing home heating and diesel motor fuel in 1985.

On March 4, 1987, Kevin Karr from the Division of Taxation ("Division") began an audit at petitioner's Buffalo office. The original audit was a truck mileage and fuel use tax audit which is not in dispute. Through an examination of petitioner's fuel invoices, sales invoices, freight bills and packing invoices, the auditor discovered that petitioner was going to locations outside of New York State and picking up petroleum products for sale in New York locations. The auditor determined that petitioner was an Article 13-A distributor subject to tax under such article of the Tax Law. This tax, imposed upon the vendor, is applicable to anyone who engages in the process of importing, or causing to be imported, petroleum products into New York State for sale in New York State. At the time of the original audit, petitioner was not a registered Article 13-A distributor as required by the Tax Law and had not been paying Article 13-A taxes on its imported fuel. Petitioner registered as an Article 13-A distributor with the help of Kevin Karr in 1987.

The Division submitted into evidence a list of workpapers tracing the fuel from the suppliers at the locations out of state to the actual delivery points within New York State. The workpapers list the names of companies who supplied products to petitioner. These suppliers include Rogers Fuel Corporation in Rochester, New York; Comtrade Petroleum, Inc. in

Brooklyn, Ontario; United Refining Company in Warren, Pennsylvania; and Kendall Refining Division in Bradford, Pennsylvania. Petitioner purchased the fuel primarily from Rogers Fuel Corporation. The Division discovered, through a review of the sales invoices, that the seller (Rogers Fuel Corporation) would give petitioner a release order number which would be communicated to the seller's depot in Pennsylvania. Typically, B.B. Mast, a transportation company hired by petitioner, would pick up the product in Pennsylvania and have it transported across New York's border.

Petitioner primarily sold its fuel products to the Seneca Indians. After importation into New York State, the petroleum would either be delivered directly to its customers on the Seneca Reservation or delivered to petitioner's Buffalo facility where it stored the product in bulk until its delivery to Seneca or Tuscarora customers. Petitioner's president, William Barnes, testified that Timothy Toohey, an attorney representing several Indian reservations, informed him that National Lubricants could sell its fuel products to the reservations exempt from the gross receipts tax imposed by Article 13-A. The auditor testified that petitioner could show an exemption from the gross receipts tax only by providing the Division with certain export certificates showing an out-of-state sale which, petitioner testified, the Senecas were unwilling to supply.

Petitioner, with the help of a professional accountant, prepared and submitted three six-column worksheets which show the amount of Number 2 fuel sold upon which gross receipts tax was not paid. These worksheets show that for the year 1986, gross sales amounted to a total of $476,537.07. This figure was broken down into sales to Indians and non-Indians, respectively, as $416,284.69 and $60,252.38.

Tax Law Article 13-A provides for an exemption from tax for Number 2 fuel, or home heating fuel, which is used for residential use. According to Karr's testimony, both diesel fuel and home heating fuel are classified as Number 2 fuel. The auditor testified that companies often distinguish between taxable and nontaxable fuel by specifying whether the Number 2 fuel is diesel or home heating fuel, the latter being nontaxable if used for residential purposes.

During the audit, petitioner supplied the Division with an Estimate Residential Use Certificate which names the buyer as the Seneca Nation of Indians, with Barry Snyder from the Cattaraugus Indian Reservation as its agent. It lists an estimated purchase of six million gallons of Number 2 oil and two million gallons of kerosene for the period June 30, 1986 through June 30, 1987. The form contained a space for the seller's name and address which was left blank. The form was signed by Barry Snyder and dated June 30, 1986. Underneath the signature line was the statement: "THIS FORM MUST NOT BE USED IN LIEU OF THE RESIDENTIAL USE CERTIFICATE, Form CT-13AH". Kevin Karr testified that the purpose of this estimated certificate is "just to give the supplier an idea of how much fuel they'll be selling to a certain individual for residential use. At the end of the year the State needs the correct certificate, which is the CT-13AH". Petitioner could not obtain the form CT-13AH from the Seneca Indians. William Barnes testified that his Indian customers vehemently disagreed with the Division's interpretation of the tax under Article 13-A and refused to provide the necessary exemption certificates because they were an independent sovereign nation not subject to the imposition of this New York tax. Because of petitioner's inability to provide the Division with the correct form CT-13AH, the auditor rejected the estimated certificate and held all of the sales to Indians subject to Article 13-A tax.

Petitioner also attempted to provide the auditor with other documentation to show tax exemption for sales to non-Senecas through resales to other Article 13-A distributors and through sales of home heating fuel for residential use. Petitioner provided a group of certificates which were not accepted by the auditor for exemption purposes because there were no 13-AR certificates which, the auditor testified, were the only certificates the Division accepts to show a resale to another Article 13-A distributor.

Without the proper certificates, the Division found all of petitioner's sales to be subject to tax under Article 13-A of the Tax Law. The auditor calculated tax due by using a two and three quarter percent tax rate on the total sales figure of $476,537.07. On April 26, 1988, the Division issued a Notice of Deficiency to petitioner. For the year 1986, the Division asserted

$13,104.69 in tax due and $1,174.08 in interest with $3,276.17 in additional charges (penalty) for a total due of $17,554.94.

On Thursday, October 20, 1988, a conciliation conference was conducted, and an order was issued on April 28, 1989 denying petitioner's requested relief. At the conference, petitioner asserted its exemptions for sales to non-Indians because those sales were, purportedly, sales of home heating oil for residential use. Kevin Karr testified that it "became evident that he [petitioner] was selling home heating oil to companies that were in the trucking business" which indicated that petitioner was selling number two fuel to these companies as diesel fuel rather than home heating fuel which precluded any exemption under Article 13-A. Combined with petitioner's inability to produce the resale certificates, the conciliation conferee deemed the sales taxable. The conferee also rejected petitioner's claim that the sales made on the Seneca Reservation were tax exempt. The Notice of Deficiency was, thus, sustained.

A petition was filed with the Division of Tax Appeals on July 31, 1989 in which petitioner requested abatement of tax, interest and penalties on sales to Indian and non-Indian consumers. At the hearing and in its post-hearing memorandum, however, petitioner conceded that "where New York law applies" it is responsible for the tax imposed on sales to non-Indians.

OPINION

In the determination below, the Administrative Law Judge found that petroleum was "imported, or caused to be imported" into New York State by petitioner, which is an activity subject to a gross receipts tax under Tax Law § 301(a). It was also determined, however, that because the Federal Indian trader statutes were intended by Congress to preempt State regulation of on-reservation sales to Indians, petitioner may not be held subject to gross receipts tax upon its sales to Indians.

The Administrative Law Judge also held that Tax Law § 303(b)(4), which requires export certificates to show that sales were not made in New York, is similarly preempted. However, because petitioner was unable to supply requisite residential use certificates in order to show

that its sales to non-Indians fell into the residential use exception provided for in Tax Law § 303(b)(1), this portion of the assessment was sustained.

On exception, the Division makes the following arguments: 1) "the federal interests implicated by the Indian trader statutes' 'comprehensive regulation' of reservation trade with Indians would only become paramount with respect to that portion of [petitioner's] sales that are ultimately made to reservation Indian consumers. . . . However, with respect to product that is ultimately sold to non-Indians [Washington v. Confederated Tribes, (447 US 134)] and [Oklahoma Tax Commn. v. Potawatomi Tribe (498 US 505)] establish that a[n Indian] nation's interest in 'marketing an exemption from state taxes' would not pre-empt an otherwise valid nondiscriminatory state tax" (Division's brief, p. 35-36); 2) petitioner failed to meet its burden of proving the taxation of the transactions at issue to be constitutionally invalid (Division's brief, p. 42); 3) although in Milhelm Attea & Bros. v. Department of Taxation & Fin. (81 NY2d 417, 599 NYS2d 510, cert granted ___ US ___, 126 L Ed 2d 329), the Court of Appeals invalidated a prospective tax collection system, the Court acknowledged that Oklahoma Tax Commn. v. Potawatomi Tribe (supra) permits a state to assess wholesalers in order to retroactively collect taxes for past sales; and 4) this case is distinguishable from Warren Trading Post Co. v. Arizona State Tax Commn. (380 US 685) and Central Mach. Co. v. Arizona State Tax Commn. (448 US 160) because although the legal incidence of the tax is the same, the economic burden in this case falls on the non-Indian consumer.

In response, petitioner argues that: 1) under the Article 13-A scheme as it presently exists, there is no means by which petitioner could establish exemption for reservation sales to Indians because State law does not provide any; 2) the Article 13-A gross receipts tax does not provide exclusions for sales to on-reservation Indian purchases other than direct sales to Indian nations for restricted internal consumption; 3) a distinction must be made between a state's authority to collect taxes on Indian sales to non-Indians and an Indian trader's sales to Indians; and 4) assuming that a "minimum burdens" test is appropriate in determining the validity of the tax imposed on petitioner's sales to reservation Indians, the taxation scheme is invalid on its

face absent some means of rational allocation of the tax impact between sales to reservation Indians and outsiders.

We affirm the determination of the Administrative Law Judge.

We will first address whether the imposition of the petroleum business privilege tax[1] upon petitioner's gross receipts from sales to Indian-run retail gas stations on the Seneca reservation is preempted by the Federal Indian trader statutes (25 USC § 261 et seq.).[2] 25 USC § 261 provides:

> "[t]he Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians" (emphasis added).

Before analyzing the facts of this case, however, we will summarize decisions of the United States Supreme Court and New York Court of Appeals which serve as the backdrop for our analysis.

In Warren Trading Post Co. v. Arizona State Tax Commn. (supra), the petitioner was a retail trading business located on the Navajo Indian reservation. The Arizona Tax Commission sought to impose a tax on "the gross proceeds of sales, or gross income" on all of the petitioner's receipts -- including its sales to reservation Indian consumers. The Supreme Court held that this imposition of the tax was inconsistent with Federal Indian trader statutes under principles of Federal preemption. Writing for a unanimous Court, Justice Black stated:

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[1]Former Tax Law § 301(a), which imposes this tax, states in part:

> "there is hereby imposed upon every petroleum business, for the privilege of engaging in business . . . for all or any part of each of its taxable years, an annual tax equal to two and three-quarters per centum of (i) its gross receipts from sales of petroleum where shipments are made to points within the state, (ii) the consideration given or contracted to be given by it for petroleum which it imported or caused to be imported (by a person other than one which is subject to tax under this article) into this state for consumption by it in this state. . . ."

[2]It is not disputed that petitioner is a "trader," which has been defined by the Supreme Court to mean any person introducing goods, or trading, in Indian country or on an Indian reservation (see, Central Mach. Co. v. Arizona State Tax Commn., supra, at 164-65 [relying on 25 USC § 264]). Therefore, it is clear that the Indian trader statutes are relevant to this case.

> "[w]e think the assessment and collection of this tax would to a substantial extent frustrate the evident Congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner" (Warren Trading Post Co. v. Arizona State Tax Commn., supra, at 691, emphasis added).

In 1980, the Supreme Court in Central Machinery Co. v. Arizona State Tax Commn. (supra) held Arizona's transaction privilege tax, which was a percentage of gross receipts, to be inapplicable to the sale of farm tractors by the petitioner, an Arizona corporation, to an on-reservation Indian farming enterprise. The tax was assessed against the seller of the goods, not the purchaser. As in Warren Trading Post, the Court emphasized the comprehensive nature of the Indian trader statutes in addressing transactions like the ones at issue:

> "by enacting these statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.' It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them 'a sweep as broad as [their] language' [citation omitted], and interpret them in light of the intent of the Congress that enacted them [citations omitted]" (Central Mach. Co. v. Arizona State Tax Commn., supra, at 166).

In Herzog Bros. Trucking v. State Tax Commn. (69 NY2d 536, 516 NYS2d 179), fuel distributors challenged a State motor fuel tax assessed against them. The taxing scheme at issue in Herzog operated as follows: the taxes were assessed to, and collected from, the distributor, who then included the tax in its wholesale price (see, Tax Law § 282[1]). After purchasing the fuel from the distributor, the retailer included the tax in its retail price, passing it on to the ultimate consumer. Where the ultimate consumer was an Indian, or otherwise exempt from taxation, the taxes were refunded to the retailer (see, Tax Law §§ 289-c, 1139). Because the Federal Indian trader statutes had been interpreted to vest the Commissioner of Indian Affairs with the sole power and authority to regulate trade with Indians and the tax scheme in Herzog imposed obligations upon wholesale Indian traders, the Court of Appeals held that the tax was

preempted by Federal law (see, Herzog Bros. Trucking v. State Tax Commn., supra). In so doing, the Court stated:

> "[t]he Supreme Court cases construing the Indian trader statutes are dispositive. We determine that Congress has preempted the field of regulating trade with Indians on reservations and has left 'no room' for the application of supplementary State tax laws, such as the one here at issue, that impose 'additional burdens' on Indian traders (see, Warren Trading Post v. Tax Commn., 380 US 685, 690). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is preempted by the Federal Indian trader laws" (Herzog Bros. Trucking v. State Tax Commn., supra, 516 NYS2d 179, 185).

Upon remand from the United States Supreme Court, the Court of Appeals adhered to its prior decision (Herzog Bros. Trucking v. State Tax Commn., 72 NY2d 720, 536 NYS2d 416).

In Milhelm Attea & Bros. v. Department of Taxation & Fin. (supra), the petitioners were again wholesalers doing business on Indian reservations. Petitioners brought an action to enjoin the enforcement of State tax regulation of cigarettes sold on Indian reservations. The taxing statute at issue, Tax Law § 417(1), imposed a tax on all cigarettes purchased in New York, and was paid by the purchase of stamps which was required to be affixed to the cigarette packages as a precondition to the first taxable sale by the wholesaler or distributor. The tax was added and collected as a part of the selling price of the cigarettes along the distribution chain, until it was ultimately added to the retail price and was paid by the consumer. Indians and Indian tribes were exempt from State taxation within their own territory and wholesale dealers could sell unstamped cigarettes to them. The Court of Appeals concluded that, although the challenged regulations were designed to prevent the avoidance of State taxes by non-Indian consumers who purchase untaxed cigarettes from Indian retailers, and the incidence of the sales tax was intended to be borne by the ultimate non-Indian consumer, the tax was nonetheless preempted by the Indian trader statutes. The Court stated that:

> "[w]hile the State's efforts to avoid what it perceives as pervasive tax avoidance by non-Indians is understandable, this tax scheme attempts to regulate in an area which Congress has taken 'fully in hand' (see, Warren Trading Post v. Tax Commn., 380 US at 690). It impinges on the Federal interest, as evidenced by the Indian trader statutes, to 'comprehensively . . . regulate businesses selling goods to reservation Indians' (see, Washington v. Confederated Tribes, 447 US at 155), and it impinges on the authority of

> the Commissioner of Indian Affairs to determine 'the kind and quality of goods and the prices at which such goods shall be sold to the Indians' (see, 25 USC § 261)."

The Court went on to say:

> "to the extent that the sales tax is imposed on all stamped cigarettes, the regulations place 'financial burdens on [plaintiffs] or the Indians with whom they deal[]in addition to those Congress and the Tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner' (see, Warren Trading Post v. Tax Commn., 380 US at 691). Manifestly, the tax regulations before us regulate trade to a significant degree. As such, they are barred by Federal preemption and cannot be applied to cigarette wholesale dealers involved in the trading with Indians on reservations located in New York State" (Milhelm Attea & Bros. v. Department of Taxation & Fin., supra, 599 NYS2d 510, 514).

We turn first to the Division's effort to distinguish this case from Warren Trading Post and Central Mach. on the basis that the economic burden of this tax falls on the non-Indian consumer. The Division acknowledges that unlike the taxes in Herzog and Attea, which were designed to be passed on to the ultimate consumer, the taxing scheme at issue was not a "pass down" tax. It contends, however, that:

> "since nothing in the Tax Law would preclude such businesses from doing so, as a matter of general industry practice, many importers of automotive fuels . . . have chosen to pass on the economic burden of the tax to subsequent purchasers, and recoup this cost as part of their sales price" (Division's brief on exception, p. 2, fn. 4).

The Division reasserted this point at oral argument, stating that "the legal incidence of the gross receipts type tax is the same as the legal incidence in Warren Trading Post and Central Mach., but the economic burden is different" (Oral Argument Tr., p. 12). Thus, it implicitly sets forth the position, without citing any authority, that it is the economic burden of the challenged tax, rather than the legal incidence, which should control in this preemption analysis.[3] However,

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[3]Although the Supreme Court has discussed economic burden in this context, it has not explicitly determined what impact, if any, it has in this preemption analysis (see, Moe v. Confederated Salish and Kootenai Tribes, 425 US 463, 481-482 [noting District Court finding that with respect to the tax at issue, both the legal incidence and the economic burden of the tax fell upon the non-Indian consumer]; see also, White Mountain Apache Tribe v. Bracker, 448 US 136, 151 [footnote 4]; Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 US 832, 853-854 [Rehnquist, dissenting]).

However, assuming that this factor is controlling, petitioner's case is stronger than the petitioners in both

this argument ignores the Supreme Court's clear statement that the purpose of the Indian trader statutes was to "ensur[e] that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress" (Warren Trading Post Co. v. Arizona State Tax Commn., supra, at 691, emphasis added). The imposition of a tax based on petitioner's gross receipts from on-reservation sales on Indians clearly constitutes a burden on petitioner. Because petitioner is an Indian trader, we conclude that the imposition of this tax upon petitioner's fuel sales to Indian-run retail gas stations on the Seneca reservation is preempted by Federal law (Central Mach. Co. v. Arizona State Tax Commn., supra; Warren Trading Post Co. v. Arizona State Tax Commn., supra; Milhelm Attea & Bros. v. Department of Taxation & Fin., supra; Herzog Bros. Trucking v. State Tax Commn., supra).

The Division also argues that because petitioner was assessed retroactive to its sales to Indian retailers, the assessment should be upheld. In support of this position, the Division appears to suggest that such an action, which was discussed in Potawatomi, was embraced by the Court of Appeals in Attea. We disagree. In Attea, the Court stated:

> "[j]ust when 'assessing wholesalers who supplied unstamped cigarettes to the tribal stores' would be justified remains unclear from the Supreme Court's decision [in Potawatomi], although its use of the past tense 'supplied' indicates that the method might somehow be used to retroactively collect taxes unpaid on past sales. But we do not read the Court's suggestions for collection remedies as altering the established law regarding Federal preemption or validating comprehensive regulation by a State of the relationship between Indian traders and their Indian purchasers"
>
> (Milhelm Attea & Bros. v. Department of Taxation & Fin., supra, 599 NYS2d 510, 514).

Thus, the Court of Appeals held that Potawatomi did not alter the established rule stated in Warren Trading Post "that Congress has taken the matter of regulating Indian traders so fully in hand that no room remains for State laws imposing additional burdens upon them" (Milhelm

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Herzog and Attea. In Herzog, although the legal incidence of the tax was upon the Indian retailer, the Legislature clearly intended the economic burden of the tax to rest with the non-Indian consumer (Herzog Bros. Trucking v. State Tax Commn., supra, 516 NYS2d 179, 181). In Attea, the legal incidence of the tax was on the wholesaler, with the economic burden again placed upon the ultimate consumer (Milhelm Attea & Bros. v. Department of Taxation & Fin., supra, 599 NYS2d 510, 511). By contrast, in the present case, the legal incidence of the petroleum business privilege tax is imposed upon petitioner, and the Legislature did not prescribe a method to pass down the economic burden of the tax to the ultimate consumer.

Attea & Bros. v. Department of Taxation & Fin., supra, 599 NYS2d 510, 514, citing Warren Trading Post Co. v. Arizona State Tax Commn., supra).

In light of this language, we find the Division's argument to be without merit.

Finally, we address the Division's claim that because petitioner has asserted that the tax at issue be preempted under the Federal Indian trader statutes the Supreme Court's "flexible preemption test" should be applied here (Division's brief, p. 14). Such an analysis has implicitly been rejected by the Court of Appeals in Herzog and Attea, where the Court has simply held that the regulation of businesses selling goods to reservation Indians "is an area which Congress has taken 'fully in hand' see, Warren Trading Post v. Tax Commn., 380 US at 690" (Milhelm Attea & Bros. v. Department of Taxation & Fin., supra, 599 NYS2d 510, 514).

We have considered the remainder of the Division's arguments and find them to be without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of National Lubricants, Inc. d/b/a American Continental Oil is granted to the extent stated in conclusions of law "C" and "D" of the Administrative Law Judge's determination; and

4. The Division of Taxation is directed to modify the Notice of Deficiency dated April 26, 1988 consistent with conclusions of law "E" and "F" of the Administrative Law Judge's determination.

DATED: Troy, New York
April 28, 1994

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

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