STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SUPREME PETROLEUM COMPANY OF NEW JERSEY, INC.	:	DECISION DTA No. 811486
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1986 through May 31, 1989.	:	

Petitioner Supreme Petroleum Company of New Jersey, Inc., P.O. Box 756, Somerville, New Jersey 08876, filed an exception to the determination of the Administrative Law Judge issued on April 28, 1994. Petitioner appeared by Tedd S. Levine, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in response. This letter brief was received on August 18, 1994, which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioner, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether petitioner has established that tax has been paid with respect to its sales of certain automobiles.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "10" and "12" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner, Supreme Petroleum Company of New Jersey, Inc. d/b/a Downs Auto Rental and Leasing, is, and was during the period in question, primarily engaged in the business of leasing motor vehicles to individuals and businesses. Petitioner also sold these motor vehicles to its lessees or to others, at the time of termination of the various leases. Petitioner's only business premises are located in Morristown, New Jersey. However, petitioner also does business in New York, Pennsylvania, Connecticut,Florida, North Carolina and California. Petitioner is a registered vendor for New York sales tax purposes.

Beginning in the summer of 1989, the Division of Taxation ("Division") conducted a sales and use tax audit of petitioner's business for the period September 1, 1986 through May 31, 1989. The Division reviewed petitioner's books and records and found the same to be adequate for purposes of conducting a detailed audit based thereon. This conclusion was communicated to and discussed with petitioner, after which petitioner executed an Audit Method Election Form. Pursuant to such election, petitioner consented to have the audit conducted based on a detailed review of its records for a test period, with the results projected over the entire period under audit in order to determine petitioner's liability, if any, for such audit period. The agreed upon test period spanned March 1, 1989 through May 31, 1989.

The auditor's review of petitioner's records for the test period revealed, inter alia, sales of seven vehicles to purchasers with New York State addresses. Petitioner's records also revealed that petitioner had not collected sales tax with respect to such sales.

On May 30, 1990, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1986 through May 31, 1989 in the amount of $52,398.74, plus interest.[1]

Petitioner and the Division engaged in various post-assessment meetings, resulting in a reduction of the amount assessed from $52,398.74 to $41,110.77. Petitioner also requested and

[1]The record includes a validated consent with respect to the period of limitations on assessment under which sales and use taxes for the period September 1, 1986 through February 28, 1987 could be assessed at any time on or before September 20, 1990.

was granted a conciliation conference before the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On September 25, 1992, BCMS issued Order No. 108338 pursuant to which the amount of tax at issue was reduced from $41,110.77 to $22,512.64, plus interest. Further, at the commencement of proceedings herein, petitioner admitted that $6,519.49 out of such $22,512.64 amount was not challenged or at issue, and represented tax due based on "clerical errors" made by petitioner. Therefore, remaining at issue in this proceeding is $15,993.15, consisting entirely of sales tax allegedly due on petitioner's sales of vehicles.

Petitioner was able to establish, prior to hearing, that tax had been paid with respect to five out of the seven vehicles sold to New York addressees during the test period. More specifically, tax was paid by the purchasers when such vehicles were (subsequently) registered in New York. However, payment of tax remains unproven as to the remaining two vehicles. The parties agreed at hearing that the mathematical calculation of the dollar amount remaining at issue ($15,993.15) results from a percentage projection based on the tax due on such two vehicles over the entire period of audit, with such calculation not at issue. Rather, what remains at issue is whether petitioner has established that tax has been paid on such vehicles or, if not, whether petitioner may be excused from its responsibility to collect the tax with respect to such vehicles.

Petitioner admits that sales tax was not collected at the time of sale with respect to the vehicles in question. Rather, petitioner claims that upon the sale of a vehicle to be registered outside of New Jersey, the document related to the sale (apparently either the certificate of title and/or sale invoice) was stamped with the phrase "sales tax not collected". Petitioner maintains this procedure was used consistently with respect to all states in which it did business, claiming that it had no knowledge or reason to have knowledge that a particular vehicle would end up registered, as is relevant here, in New York. Petitioner does not dispute that it should have collected tax with respect to the vehicles at issue. Rather, petitioner maintains it was ignorant of its responsibility to do so during the period in question. In fact, immediately subsequent to the

audit, petitioner revised its procedures such that it now collects tax on all of such sales transactions.

In an effort to ascertain whether tax had been paid upon registration of the vehicles held taxable on audit, petitioner attempted to obtain information from the New York State Department of Motor Vehicles ("DMV"). This effort included the service of a subpoena upon DMV on or about December 9, 1991.[2] In response to the subpoena, petitioner's former attorney received a letter from DMV dated December 13, 1991 indicating that in order to receive sales tax information a request should be made to the New York State Department of Taxation and Finance, Centralized Photo Unit, Building #8, W. A. Harriman Campus, State Campus, Albany, New York 12227. This letter further specified that DMV "will discontinue to provide requestors with sales tax information." There is no evidence in the record that petitioner attempted any further enforcement efforts with respect to the subpoena served on DMV, or that petitioner made any attempts to obtain information from the Department of Taxation and Finance at the address indicated in the correspondence received from DMV.

During the course of the BCMS conference, the conferee allegedly indicated that he would attempt to obtain information with regard to the two vehicles in question. At hearing, three pages (pages 2, 3 and 4) of a Division "EDP Audit Bureau Motor Vehicle Payment File" were offered as evidence. These three pages are dated July 13, 1992 and indicate the time as 11:11-11:12 (presumably the time of inquiry via computer). Page 2 reflects the payment of tax with respect to an automobile registered by one Evelyn M. Sulibit. At hearing, it was confirmed that this automobile was one of the seven vehicles at issue on audit, that the Division's auditor allowed credit based on the payment of tax, and that such credit resulted (in part) in the described BCMS

[2]Petitioner's efforts in this regard are described in an affidavit made by petitioner's former counsel and attached to petitioner's brief. The submission of this affidavit and a copy of the subpoena, though post-hearing, was not contested by the Division. Given that the same items were discussed in general terms at hearing, and have not been objected to, they are accepted as part of the record.

ordered reduction to the notice of determination (see, above). The other two pages provide the following information:

at Page 3:	Taxpayer name - Elizabeth Schreiber 350 Pennsylvania Avenue Freeport, NY 11520 Identification Number: 1LJBP96F4FY652504 Tax paid: Zero
at Page 4:	"No records found for these VIN codes 1LTBP96F1FY651505"

We modify the Administrative Law Judge's finding of fact "10" to read as follows:

> The auditor's workpapers show the two vehicles remaining at issue were sold to Elizabeth Schreiber and to Robert and Elizabeth Schreiber, respectively, with each vehicle sold at an invoice amount of $9,800.00. The vehicle identification numbers for these vehicles, as shown on the auditor's workpapers, are, respectively, 1LJBP96F4FY652504 and 1LTBP96F1FY651505 (matching the vehicle identification numbers shown on the Division's EDP Audit Bureau Motor Vehicle Payment File).[3]

Petitioner's Exhibit "1" in evidence is a sales invoice with respect to the sale of a 1985 Lincoln Town Car, number 1LJBP96F4FY652504, to Elizabeth Schreiber with a listed address of 350 Pennsylvania Avenue, Freeport, New York 11520. This invoice, dated April 24, 1989, indicates a selling price of $9,800.00 for the vehicle and, under the area of the invoice reserved for New Jersey sales tax, includes the handwritten abbreviation "NY" (New York). There is no amount shown as sales tax collected by petitioner on this sale.

We modify the Administrative Law Judge's finding of fact "12" to read as follows:

> Attached to petitioner's brief as Exhibit "A" is a vehicle lease agreement indicating the lease of a 1985 Lincoln Town Car Limousine, vehicle identification number 1LJBP96F1FY651505 to Robert Schreiber and Elizabeth Schreiber, 350 Pennsylvania Avenue, Freeport, New York 11520. In the area reserved for tax there is the typed legend "NY Exempt". This lease agreement is

[3]We modify finding of fact "10" of the Administrative Law Judge's determination by adding the words "as shown on the auditor's workpapers" in the second sentence to more accurately reflect the record.

> undated. The auditor's workpapers show the invoice date with respect to both vehicles as April 1989.[4]

We find an additional finding of fact to read as follows:

> The VIN code on the Vehicle Lease Agreement, Exhibit "A" of petitioner's brief, is not identical to the VIN code on the EDP Audit Bureau, Motor Vehicle Payment File.

Although there is some testimony to the effect that petitioner utilized a stamp with respect to sales of vehicles stating "Sales Tax Not Collected" (see, above), the evidence does not include examples where such stamped legend appears (e.g., on sales invoices or photocopies of certificates of title). Rather, the evidence regarding sales tax is, as described, comprised of a handwritten notation abbreviating New York ("NY") and/or the typed legend "NY Exempt".

OPINION

In the determination below, the Administrative Law Judge, in reviewing Tax Law §§ 1131(1), 1132(a) and 1132(c), held that petitioner was a registered vendor for New York sales tax purposes, the vehicles in question were sold to purchasers with New York addresses, and petitioner was obligated to collect tax upon its sales of such vehicles unless it could establish that such sales were not subject to tax.

The Administrative Law Judge discussed petitioner's arguments that the Department of Motor Vehicles erroneously allowed the registration of the vehicles in question as well as petitioner's argument that its vendor's obligations to collect tax was met by affixing a stamped legend on the back of each vehicle transfer document (certificate of title) indicating that no tax was collected on the sale.

The Administrative Law Judge rejected all arguments holding that:

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[4] We modify finding of fact "12" of the Administrative Law Judge's determination by changing the invoice number from 1LTBP96F1FY651505 to 1LJBP96F1FY651505 to correctly reflect the record.

1) the evidence to support the affixing of a stamp to the transfer document was less than clear, and further, petitioner cited no legal authority to support said argument (Determination, conclusion of law "B");

2) "[p]etitioner's argument that DMV may have erroneously allowed the registration of one or both of the Schreibers' vehicles without requiring proof of payment of tax or upon accepting fraudulent evidence of payment or exemption is not only speculative, but is insufficient to relieve petitioner of its obligation to collect tax in the first instance (Matter of Mendon Leasing Corp. v. State Tax Commn., 135 AD2d 917, 522 NYS2d 315, lv denied 71 NY2d 805, 529 NYS2d 276)" (Determination, conclusion of law "C");

3) there is no evidence reflecting any follow-up efforts by petitioner, including attempts to enforce a subpoena served on DMV or whether petitioner followed DMV advice to obtain information from a specific Department of Taxation and Finance source (Determination, conclusion of law "C").

The Administrative Law Judge, in sustaining the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 30, 1990, as reduced by the conciliation order, held that petitioner, who admitted that tax was not initially collected as was required, also had failed to show that such tax was paid at anytime thereafter (or was not due) with respect to its sales of the vehicles.

On exception, petitioner argues that even if a taxpayer was obligated in the first instance to collect taxes, such obligation is reduced when sales taxes are, in fact, paid to New York State by the purchaser of a vehicle upon registration or when a determination is ultimately arrived at that no taxes are due.

Petitioner also argues that: 1) while the burden to collect sales tax may remain with the taxpayer and does not shift to the DMV as an agent of the State, the DMV should cooperate in helping a taxpayer determine its true obligation and 2) due to the negligent failure of the DMV to

require the party registering the motor vehicle to pay tax, the DMV damaged petitioner to the extent that sales tax due had not been collected.

Petitioner further argues:

> "[a]t hearing, three pages (pages 2, 3 and 4) of a Division 'EDP Audit Bureau Motor Vehicle Payment File' were offered as evidence...
>
> at Page 4: 'No records found for these VIN codes 1LTBP96F1FY651505'
>
> "This particular vehicle was one of the two that was in doubt. However, as a result of the State finally securing this information, it has now been established that this automobile was never registered in New York State, and that no taxes are actually due" (Petitioner's brief, p. 4).

The Division argues that the DMV did not have a record of tax being paid on the two vehicles in question which were sold to the same party and, further, "[t]he law is clear that involvement of DMV in the sales tax collection process does not excuse a vendor of motor vehicles from collecting sales tax on its sales" (Division's letter brief in opposition, p. 2).

Petitioner, in reply, argues:

1) the State has misstated the facts and correspondingly has reached an improper conclusion;

2) the information retrieved from the Motor Vehicle File is proof that no payments were received and that no vehicle was registered;

3) since the vehicle in question was not registered in New York, no taxes are due; and

4) the assessment should be adjusted downward even if the taxpayer was obligated in the first instance to collect such taxes.

We affirm the determination of the Administrative Law Judge.

The record before us does not support petitioner's argument. If the VIN code shown on Exhibit "A" is correct, the Motor Vehicle Payment check was made using an incorrect VIN code

and the record, therefore, does not reflect, as petitioner argues, that this automobile was never registered in New York State and no taxes are actually due.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Supreme Petroleum Company of New Jersey, Inc. is denied;

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

3. The petition of Supreme Petroleum Company of New Jersey, Inc. is denied; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 30, 1990, as reduced per the conciliation order, is sustained.

DATED: Troy, New York
February 16, 1995

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

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