STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GOETZ ENERGY CORPORATION	:	DECISION DTA NO. 815558
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1991 through 1993.	:	

Petitioner Goetz Energy Corporation, P.O. Box A, Buffalo, New York 14217-0305, filed an exception to the determination of the Administrative Law Judge issued on June 18, 1998. Petitioner appeared by Falk & Siemer, LLP (Gary M. Kanaley, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on May 20, 1999.

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

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of tax paid pursuant to Tax Law § 186-a for the years 1991 through 1993 where, following petitioner's payment of such tax, the Division of Taxation agreed not to audit or assess certain other taxpayers for potential liabilities arising under section 186-a for years prior to 1994.

FINDINGS OF FACT

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

Petitioner, Goetz Energy Corporation, is a petroleum distributor that sold and marketed natural gas through pipes and mains in New York State for ultimate consumption within the State during the years 1987 through 1994.

Petitioner was subject to tax under Tax Law § 186-a during 1987 through 1994 because of its activities as a seller and marketer of natural gas.

Petitioner, along with other companies in the natural gas industry, did not timely file returns and pay tax due under Tax Law § 186-a of the Tax Law for the years 1987 through 1993 because of confusion as to its liability.

In January 1994, attorney Mark Klein of the Buffalo law firm of Hodgson, Russ, Andrews, Woods & Goodyear requested and was granted a meeting with the Director of the Corporation Tax Bureau, Dominick Sciortino. At this meeting, Mr. Klein informed the Division of Taxation ("Division") that he represented a taxpayer who had not been properly filing under Tax Law Article 9, § 186-a, but who now wanted to come forward and file returns. The identity of the taxpayer in question, although not revealed to the Division at that time, was the petitioner in this matter.

Mr. Klein proposed that his client would file returns and pay the tax due under section 186-a for the years 1991 through 1993. In return for the taxpayer's voluntary compliance, Mr. Klein requested that the Division not assess penalties or audit or assess the taxpayer for years prior to 1991.

As a follow-up to the January 1994 meeting, Mr. Klein sent a letter to the Division which reiterated the background facts and confirmed that an agreement had been reached. The substance of the agreement was that the taxpayer would come forward and file returns for the previous three years and the Division would accept such returns as filed and not assess penalties with respect to the 1991 and 1992 returns. In addition, the Division agreed to limit petitioner's exposure to the section 186-a tax to tax years beginning after December 31, 1990. The Division was unwilling to put this agreement in writing; however, the Division did agree to the terms proposed and accepted the returns and payments subsequently remitted by petitioner.

Petitioner filed forms CT-186-A for the years 1991 through 1993 on or about March 8, 1994. These returns reported tax due under section 186-a in the respective amounts of $37,549.88 (1991), $64,821.77 (1992), and $81,531.60 (1993). Payment in full of the tax reported due accompanied the returns.

Petitioner received a financial benefit as a result of the Division's agreement not to assess penalties with respect to its 1991 and 1992 returns and not to audit or assess petitioner for years prior to 1991. There is insufficient information in the record regarding the nature of petitioner's business before 1991 to reasonably estimate the amount of this benefit.

The Division accepted petitioner's returns for the years at issue as filed. The Division did not audit petitioner with respect to Tax Law § 186-a for any of the years during which petitioner was engaged in the business of selling and marketing natural gas.

On or about May 22, 1996, petitioner filed three claims for credit or refund of corporation tax paid (Form CT-8) and amended utility services tax returns (Forms CT-186-A) for the years

ended 1991 through 1993. These documents claimed refunds of the amounts of tax under section 186-a previously paid on or about March 8, 1994 (***see***, above).

The basis for petitioner's refund claims was a January 10, 1995 letter that had been sent by John B. Langer, former Deputy Commissioner for Operations, to Mark Klein (in his capacity as representative for other gas marketers), wherein the Division indicated that for the companies who voluntarily came forward, properly filed and (where appropriate) paid their section 186-a tax liabilities for the 1994 tax year forward, the Division would not go back and audit prior tax years.

On August 24, 1995, the Division issued to petitioner a Notice of Disallowance covering all three refund claims. The Notice of Disallowance stated that petitioner was correctly classified as an Article 9, section 186-a taxpayer and that it had properly filed returns for the 1991 through 1993 period. Accordingly, the notice stated that there was no basis for the refund claims.

On December 1, 1994, following the negotiation of the agreement between petitioner and the Division and petitioner's filing of returns and payment of section 186-a tax, the Division met with Mr. Klein, along with a lobbyist for the Independent Oil and Gas Association of New York (IOGA) and the president of a gas marketing company headquartered outside of New York. One of the issues to be discussed at the meeting was the alleged confusion in the natural gas industry regarding which taxpayers were subject to section 186-a. It is not clear whether Mr. Klein was representing IOGA, the out-of-state based marketer or other gas marketers at this meeting.

The Division was advised at the meeting that there were a number of gas marketers who should have been filing and paying tax under section 186-a, and that these noncompliant marketers wanted to correct the situation.

When a taxpayer voluntarily discloses a failure to file returns the Division's general policy is to request that the taxpayer submit a letter setting forth the facts of its situation and stating how the taxpayer would like to proceed. The method by which the Division ultimately resolves the situation varies from case to case. Depending upon the facts, the Division may require the taxpayer to file returns from the date it began doing business; it may require the taxpayer to file returns for a number of years (e.g., 1 to 3 years); or it may require the taxpayer to file for the current tax year and forego any audits of prior years. The Division tries to be consistent, but does not treat all voluntary disclosures in the same industry in the same manner.

According to John Verde, Tax Administrator I, one of the reasons for the Division's inconsistency in handling voluntary disclosures is that it must rely on the facts as presented by the taxpayer's representative and the Division generally is not advised of the identity of the taxpayer in question until it agrees to the terms proposed by the representative.

The issue of companies which had already come forward and paid tax due under section 186-a for prior years was discussed at the meeting. Mr. Klein advised the Division not to worry about those taxpayers and that the main concern at that point was a level playing field from that time forward. The Division's original position was that the taxpayers under consideration should file returns and pay tax due for the previous three years. However, the taxpayer group indicated that the companies in question were poor farmers who would be forced out of business if they were required to pay retroactively.

There is no evidence in the record that petitioner ever consented to the settlement agreement reached with the other companies or that such other companies were actually concerned about leveling the playing field for the future.

The Division's former Deputy Commissioner for Operations, John B. Langer, subsequently sent a letter to Mr. Klein, dated January 10, 1995, to confirm the settlement reached as a result of the foregoing discussion. That letter provides, in pertinent part:

> On December 1, 1994 we met with you and several other persons concerning the application of sections 186 and 186-a of the Tax Law to gas producers, sellers and marketers. You concurred with other persons from the industry attending this meeting (as well as an earlier meeting) that there had been significant confusion among many people in the natural gas distribution industry about their functions as 'sellers' or 'marketers' in the natural gas distribution system. . . . You advised that some well-counseled firms in the industry had, notwithstanding this confusion, met their legitimate Article 9 state tax obligations and were most concerned about 'leveling the playing field' for the future rather than the perceptions of past 'inequities'.
>
> Subsequently, you and others were advised that the Department acknowledged that the confused state of affairs within the industry and the strong desire of those who would have paid their apparent Article 9 state tax obligations to begin filing and paying appropriately for 1994, required us to rethink our audit program in this area. Specifically, we have advised that with respect to companies which voluntarily come forward, properly file, and, where appropriate, pay their Article 9 tax liabilities (generally arising under sections 186 and 186-a) beginning with tax year 1994 and all subsequent periods, we will eschew our authority to audit such companies for potentially similar liabilities for pre-1994 tax periods. Obviously, companies who do not desire to meet their tax obligations by coming forward as proposed cannot claim 'good faith' uncertainty as to any of their obligations (now or before) and will be subject to audit.
>
> We confess to some confusion as to your questions about refund claims in light of your statements about the appropriate and careful tax advice which had been afforded to certain companies within this industry that they were obliged to make filings and payments pursuant to Article 9. If tax liabilities were due, owing and appropriately paid, obviously, 'refund' claims will be denied. You are, of course, fully conversant with available remedies when claims of overpayment are denied by the Department.

At the hearing, Mr. Verde, who was present at the meeting and involved in the Division's handling of this matter, testified as to the intent of the Division in issuing the January 10, 1995 letter. According to Mr. Verde, the Division sought to comply with the taxpayers' request to level the playing field for the future. Also according to Mr. Verde, the Division's decision to "eschew" its authority to audit for pre-1994 liabilities with respect to companies who came forward and began to file for 1994 was justified because the Division did not know the identities of the companies involved, had no formal audit program in this area and no means of finding every nonfiler. The Division therefore decided to proceed in the manner described in the letter in an effort to bring taxpayers into compliance as of the current year and thereby prevent future inequities.

The Division also concluded that factual differences existed between petitioner's situation and the situation of the noncompliant taxpayers described at the meeting which warranted its acceptance of the settlement terms proposed at the meeting. Specifically, the noncompliant taxpayers described at the meeting were said to be small, unsophisticated farmers who would be forced out of business if required to pay tax owed under section 186-a for prior years. In contrast, the Division perceived petitioner to be a large, sophisticated corporation with the resources to pay past due taxes.

The Division received Article 9, § 186-a returns from three or four taxpayers in response to the policy stated in the January 10, 1995 letter. These three or four taxpayers were large companies headquartered in other states. According to Mr. Verde, these companies were larger than the Division had anticipated based on the discussions at the meeting. Overall, the Division

detected no significant increase in the number of Article 9, § 186-a returns filed for the 1994 tax year, as compared to the previous year.

Following receipt of petitioner's refund claims in May 1995, the Division concluded that there had been a misunderstanding of the settlement terms by Mr. Klein. It was the Division's position that the January 10, 1995 letter had clearly stated that refunds of tax properly paid would not be made. Nonetheless, at least one of Mr. Klein's clients, i.e., petitioner, who had late-filed and paid the tax due, had subsequently filed a refund claim. Since the Division had not expected to receive such a refund claim, and in order to make the Division's position clear, the acting Deputy Commissioner of Operations, Harris Sitrin, sent a letter to Mr. Klein, dated March 12, 1996, which stated, in pertinent part:

> As you recall, the [January 10, 1995] correspondence provided the opportunity for those companies subject to the [§ 186-a] tax to come forward and properly address their Article 9 tax liability for 1994 and future years. To date, several companies have come forward to address their filing responsibility.
>
> To assure that the Department's position is the proper position required by law, I have sought the advice of Counsel. That advice is stated as follows:
>
> 1. The Commissioner or his delegate does have the power to encourage non-compliant taxpayers to come forward and pay taxes due and comply with the law, equally;
>
> 2. The audit selection process is the prerogative of the Commissioner. Simply put, the taxpayers and the periods selected are solely at his discretion;
>
> 3. The Commissioner's power to promote voluntary compliance should not be misconstrued as a forgiveness of past liabilities of taxpayers who properly paid tax;

> 4. The law is clear that properly paid taxes cannot be refunded; and
>
> 5. This position was adequately clear in the January 10, 1995 letter, and any refund claims based on past properly paid taxes must be denied.
>
> To eliminate any perceived misconceptions, the portion of the letter, not consonant with the Counsel's opinion, is withdrawn. All entities and persons liable for the tax are subject to the regular audit and selection processes of the Department.

According to Mr. Verde, the March 12, 1996 letter was intended to clarify the Division's position with respect to refund claims under the circumstances discussed therein and also to refine the Division's audit policy in this area by clearly stating that all entities and persons liable for the section 186-a tax are subject to the regular audit and selection process.

The Division has never audited either petitioner or any of the three or four companies which came forward in response to the policy stated in the January 10, 1995 letter.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner and the natural gas marketers who came forward in response to the January 10, 1995 letter were similarly situated in that all were equally obligated under Tax Law § 186-a. Further, the Administrative Law Judge found that petitioner received different treatment from the Division in that the settlement agreement it reached with the Division was relatively less advantageous than the settlement agreement reached with the other gas companies that voluntarily came forward a year later. The issue presented was whether the disparate treatment was proper and the Administrative Law Judge found that it was based on the public policy that "favors full and uninhibited enforcement of the Tax Law" (***Matter of Turner Constr. Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78,

80). The Administrative Law Judge agreed with the Division that it would also be contrary to public policy to grant petitioner's refund claim for taxes which were lawfully due and paid since that would be contrary to the general rule that laches, waiver or estoppel may not be employed against the State (***citing Matter of Jamestown Lodge 1681 Loyal Order of Moose v. Catherwood***, 31 AD2d 981, 297 NYS2d 775). Although the Administrative Law Judge determined that the Division's denial of the refund claim was unrelated to its interest in maximizing compliance, its denial was related to the Division's enforcement interests and was proper.

Petitioner's argument that the Division violated the Equal Protection clauses of the New York and Federal constitutions because it arbitrarily distinguished between similarly situated taxpayers and that said action was not rationally related to a legitimate state purpose was rejected by the Administrative Law Judge because petitioner did not establish the elements for a claim of discriminatory enforcement, which the equal protection claim was interpreted to constitute. To prove a claim of discriminatory enforcement, petitioner needs to prove selectivity of enforcement and that the selectivity arose from "an intentional invidious plan of discrimination on the part of the Division" (***Matter of Petro Enters.***, Tax Appeals Tribunal, September 19, 1991). Further, the Administrative Law Judge noted that, "[i]t is only where the party affected can show a palpable and deliberate scheme to oppress him while excluding all others who come within the terms of the [statute] that such an objection (unconstitutionality) can be sustained" (***People v. Dahlman,*** 82 Misc 2d 927, 371 NYS2d 60, 63, ***affd*** 87 Misc 2d 261, 383 NYS2d 946). Since petitioner failed to prove these elements, the Administrative Law Judge rejected its equal protection argument. In a perceptive analysis, the Administrative Law Judge noted that the

correct grouping of similarly situated taxpayers in this case was not those that properly paid the tax and were denied a refund and those that did not pay the tax, rather, it was those that did not pay the tax due pursuant to Tax Law § 186-a for the years 1991 through 1993 and those that did. Viewed in this manner, it is clear that petitioner was not singled out. Petitioner and all sellers of natural gas were expected to comply with the law for the years 1991 through 1993 and the Division was enforcing that provision.

In addition, the Administrative Law Judge refused to compare the voluntary disclosure agreements between the Division and petitioner and the Division and other natural gas marketers. Such agreements are within the province of the Division's enforcement strategy and "latitude must be accorded authorities charged with making decisions related to legitimate law enforcement interests, at times permitting them to proceed with an unequal hand" (***Matter of 303 West 42nd St. Corp. v. Klein***, 46 NY2d 686, 416 NYS2d 219, 224). The Administrative Law Judge held that petitioner received the benefit of its bargain with the Division, to wit: it was relieved of responsibility for taxes due prior to1991 and was not assessed penalties for unpaid taxes for the years 1991 and 1992. Petitioner's acceptance of this arrangement eviscerated its selective enforcement argument since it is difficult to find an invidious plan of discrimination when petitioner had clearly profited.

Finally, the Administrative Law Judge rejected petitioner's argument that it did not protest the nonenforcement of Tax Law § 186-a, but the denial of its refund claim, which resulted in a denial of its equal protection rights. The Administrative Law Judge noted that the refund claim was premised on the Division's nonenforcement of Tax Law § 186-a and, therefore, petitioner's

constitutional argument was properly categorized, analyzed and disposed of as one of discriminatory enforcement.

ARGUMENTS ON EXCEPTION

On exception, petitioner has raised no new legal arguments or issues. Petitioner claims that the Administrative Law Judge inappropriately defined the legitimate state interest being protected as enforcement of the Tax Law and that the denial of the refund claim was not related to this interest. In addition, petitioner continues to argue that the refund denial constituted discriminatory enforcement and a violation of its right to equal protection.

OPINION

After carefully reviewing the record in this matter, we find that the Administrative Law Judge has fully and correctly addressed each of the issues raised by petitioner herein. Petitioner has presented no basis for modifying the Administrative Law Judge's determination in any respect.

In addition, we also find persuasive ***Matter of J.C. Penney, Co.*** (Tax Appeals Tribunal, April 27, 1989) and ***Matter of Savemart v. State Tax Commn***. (105 AD2d 1001, 482 NYS2d 150, ***appeal dismissed*** 64 NY2d 1039, 489 NYS2d 1029) which held that "[t]he fact that the commission chooses not to assess sales tax in some cases does not bar it from assessing such tax in petitioners' case" (***Matter of Savemart v. State Tax Commn.***, ***supra***, 482 NYS2d, at 152). These cases lend further support to our conclusion that the Division was justified in its treatment of petitioner under the circumstances.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Goetz Energy Corporation is denied;

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

3. The petition of Goetz Energy Corporation is denied; and

4. The Notice of Disallowance dated August 24, 1995 is sustained.

DATED: Troy, New York

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Donald C. DeWitt
President

_____
Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner