STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RAD ENERGY CORP.	:	DECISION DTA NO. 818902
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period December 1, 1997 through April 30, 1998.	:	

Petitioner RAD Energy Corp., c/o Carl S. Levine, Esq., 125 Jericho Turnpike, Jericho, New York 11753, filed an exception to the determination of the Administrative Law Judge issued on September 11, 2003. Petitioner appeared by Carl S. Levine, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer L. Hink, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on July 29, 2004 in New York City.

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

ISSUE

Whether petitioner's application for a refund of petroleum business tax on the basis of a bad debt was properly denied by the Division of Taxation.

FINDINGS OF FACT

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

During the period in issue, petitioner, RAD Energy Corporation ("RAD"), was registered as a petroleum business as defined in section 300(b) of the Tax Law.

From December 1997 through April 1998, RAD sold gasoline to Bayview Fuel Oil, Inc. ("Bayview"). The fuel was delivered to fuel trucks controlled by Bayview and then resold and delivered to retail service stations in New York State.

The service stations did not pay Bayview for the diesel fuel or gasoline and, in turn, Bayview did not pay RAD.

Petitioner filed an Application for Refund of the Petroleum Business Tax Because of a Bad Debt. The application, which was dated July 17, 2000, sought a refund of petroleum business tax for the period December 1, 1997 through April 30, 1998 in the amount of $407,090.85.[1] Petitioner's application included RAD's income tax return for the year 1998 which claimed a deduction for a bad debt in the amount of $2,227,585.00. The refund application also included a series of documents regarding a petition for bankruptcy that had been filed by Bayview. Petitioner was at the top of Bayview's list of creditors holding the largest unsecured claims.

Prior to ruling on the application for a refund, the Division of Taxation ("Division") reviewed Bayview's operation in order to determine if Bayview was an operator of filling

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[1] On its face, the application states that it is for the period January 1, 1998 through December 31, 1998. However, an examination of the documents which accompany the application shows that the period at issue is December 1, 1997 through April 30, 1998.

stations. After examining the Division's files pertaining to Bayview and the description of Bayview's operation in the bankruptcy plan, the Division concluded that there was no indication that Bayview operated any filling stations, and therefore petitioner did not satisfy the statutory criterion for a refund. Since the Division concluded that the transactions did not qualify, it did not investigate the ultimate disposition of the fuel in order to determine whether the fuel was delivered to filling stations.

In a letter dated November 3, 2000, the Division advised petitioner that its claim for refund was denied. The letter explained that in order to qualify for a refund, the motor fuel must have been:

> 1) included in the reports filed by such petroleum business and all the taxes must have been paid and
>
> 2) sold in bulk to a purchaser for such purchaser's own use and consumption or sold to a filling station.

The Division concluded that the claim for refund failed the second requirement because the product was purchased for resale and the resale was not to a filling station operated by Bayview.

RAD was involved in various businesses. It owned terminals, it purchased and resold petroleum products, it operated service stations and it sold to commercial accounts. It may have been the largest supplier of petroleum products to New York City and many New York State agencies.

On January 1, 2001, RAD sold most of its operating assets to Sprague Energy which had its headquarters in Portsmouth, New Hampshire.

Petitioner maintained a terminal facility in Oceanside, New York. Initially, RAD acquired one terminal from Sunoco and another terminal from Exxon. At some point in time, the terminals were connected and they were operated as one terminal.

In or about 1995, one of RAD's marketing vice presidents secured Bayview as a customer. From approximately 1995 through 1998, RAD sold Bayview home heating oil, diesel fuel and gasoline from its terminal in Oceanside.

In the beginning, Bayview paid its bills promptly. At some point, the account receivable from Bayview began rising quickly and the checks or wire transfers were dishonored because of insufficient funds. This prompted RAD to stop selling to Bayview.

RAD filed an application for a credit or refund of sales and use taxes on the basis of those sales to Bayview for which it had not been paid. This application was granted. RAD also filed an application for a refund of prepaid motor fuel tax under Article 12-A of the Tax Law on the same basis. The claim was denied by the Division because there is no statutory authority for such a refund. For the same reason, the denial of the claim for a refund was upheld in ***Matter of RAD Energy Corp.*** (Tax Appeals Tribunal, September 12, 2002).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge rejected petitioner's argument that the Division was collaterally estopped from contesting the findings of fact contained in an earlier case involving petitioner, ***Matter of RAD Energy Corp.*** (***supra***). The Administrative Law Judge noted that in that case, the issue presented was whether Article 12-A of the Tax Law provided statutory authority to allow a refund of motor fuel tax for bad debts. The Tax Appeals Tribunal decided that there was no statutory authority which allowed a refund of motor fuel tax for bad

debts. The Administrative Law Judge concluded that the issue which was resolved in the earlier ***RAD Energy*** case was a pure question of law. He determined that the factual question of where the gallons of motor fuel were delivered had no bearing on the resolution of the case.

The Administrative Law Judge found that Tax Law Article 13-A unquestionably permits a refund of petroleum business tax for bad debts under certain conditions. However, in the present case, the issue was whether the statutory criteria for permitting such a refund have been satisfied. The Administrative Law Judge concluded that there was no identity of issue between this case and the earlier ***RAD Energy*** case and there was never a full and fair opportunity in the earlier case to litigate the issue which is presented here. Therefore, the Administrative Law Judge determined that petitioner's reliance upon the doctrine of collateral estoppel was completely without merit.

The Administrative Law Judge reviewed the criteria provided in Tax Law § 301-*l* for a refund of petroleum business tax. Pursuant to that section, a refund is allowed when the transfer of motor fuel results in a worthless debt if the fuel was sold in-bulk for the purchaser's own use and consumption. Further, a sale of motor fuel and enhanced diesel motor fuel to a filling station is deemed to be a sale in-bulk for such filling station's own use and consumption.

The Administrative Law Judge noted petitioner's argument that the statute does not say that when there is a sale to a filling station the registered petroleum business must have made the delivery directly to the filling station rather than selling to a sub-distributor who then made the delivery. Further, petitioner submitted that since the product was delivered directly to filling stations, the spirit of the statute has been satisfied.

The Administrative Law Judge found petitioner's arguments to be without merit and contrary to the express language of the statute. The Administrative Law Judge concluded that the fact that the motor fuel was ultimately delivered to a filling station was simply irrelevant. The Administrative Law Judge observed that the statute focuses on the party to whom the motor fuel is sold. The statute provides that a refund for a bad debt is permitted to a petroleum business which imports motor fuel into this State, reports and pays tax on such motor fuel, and then (i) *sells* the motor fuel in-bulk to a purchaser who uses and consumes the motor fuel or (ii) *sells* the motor fuel to a filling station.

ARGUMENTS ON EXCEPTION

On exception, petitioner asserts that there is no doubt that the fuel at issue was delivered to filling stations in New York. Petitioner argues that if the motor fuel was sold to a filling station, whether directly by the taxpayer claiming the refund or by a distributor or jobber in the chain of delivery, then the requirements of the statute are satisfied and a refund is available. Petitioner disagrees with the conclusion of the Administrative Law Judge that the fact that the motor fuel was ultimately delivered to a filling station is "simply irrelevant." Rather, petitioner maintains that if the Administrative Law Judge is correct, the Legislature would likely have worded Tax Law § 301-*l*(a)(ii) differently.

In response, the Division acknowledges that petitioner met the first and third requirements for a refund of petroleum business tax under Tax Law § 301-*l*. However the Division contends that petitioner did not meet the second requirement for a refund. The Division maintains that in order to meet the second requirement, petitioner's customer Bayview would have had to purchase the fuel for its own use or consumption or would have had to operate a filling station.

Here, it is clear that Bayview purchased the fuel for resale and it did not operate a filling station. Therefore, the second criterion for entitlement to a refund has not been satisfied.

OPINION

The Legislature, by its specific language in Tax Law § 301-*l*(a), has prescribed the limited circumstances in which a refund of petroleum business taxes can be had when the transfer of its product results in a worthless debt. Specifically, the criteria to be met in order for a refund to be granted are the following:

> where (i) such gallonage has been included in the reports filed by such petroleum business or aviation fuel business and all the taxes under this article with respect to such gallonage have been paid by such business, (ii) such gallonage was sold in-bulk by such petroleum or aviation fuel business to a purchaser for such purchaser's own use and consumption and (iii) such sale gave rise to a debt which became worthless, as that term is used for federal income tax purposes, and where such debt is deducted as a worthless debt for federal income tax purposes for the taxable year covering the month in which such refund claim relating to such debt is filed. Provided, however, for the purposes of this section, a sale of motor fuel and enhanced diesel motor fuel to a filling station shall be deemed to be a sale in-bulk for such filling station's own use and consumption . . . .

Pursuant to Tax Law § 315(a), the provisions of Article 12-A are incorporated into Article 13-A. Tax Law § 282(6) of Article 12-A defines a "filling station" to "include any place, location or station where motor fuel or Diesel motor fuel is offered for sale at retail."

While logic may suggest that there is little distinction in the ultimate disposition of the motor fuel sold by petitioner to Bayview between a sale directly to a filling station and a sale for resale to a filling station (the latter of which describes the nature of petitioner's sales to Bayview), the decision to allow a refund only in limited circumstances is a legislative prerogative and not one which we are at liberty to expand upon. Further, we cannot supply our own judgment in place of the Legislature's.

Here, the language of the statute is clear on its face. As petitioner does not meet the strict criteria established by statute in order to be entitled to a refund, no refund of petroleum business tax is available. In this regard, we refer to our denial of petitioner's claim for refund of motor fuel tax relative to the identical bad debt at issue in this proceeding:

> In order for petitioner to obtain a refund or credit of the motor fuel tax paid on sales where payment has been determined to be uncollectible, petitioner must demonstrate that it is authorized to deduct the uncollectible sales from its motor fuel tax base. A deduction has been found to be "functionally a particularized species of exemption from taxation . . . [a] taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027). As set forth above, there is no statutory authorization that would enable petitioner to deduct the uncollectible portion of its motor fuel sales from its otherwise taxable transactions in order to obtain a credit or refund. Further, where a petitioner challenges the Division's interpretation of a statute, it must prove that its interpretation is the only reasonable interpretation, or that the Division's interpretation is unreasonable (***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867, 472 NYS2d 744, ***affd***, 64 NY2d 682, 485 NYS2d 526). Based on the foregoing, we find that the Division's interpretation of Article 12-A was reasonable, and, as a result, petitioner's challenge must be rejected (***Matter of RAD Energy Corp., supra***).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of RAD Energy Corp. is denied;

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

3. The petition of RAD Energy Corp. is denied; and

4. The Division of Taxation's denial of petitioner's claim for credit or refund is sustained.

DATED: Troy, New York
December 30, 2004

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner