STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition<br>of<br>PENN YORK ENERGY CORPORATION<br>for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods March 1, 1980 through November 30, 1981 and September 1, 1982 through November 30, 1982. | : | ORDER<br>DTA NOS. 801098, 801227, 807595, 806344 AND 806850 |
| In the Matter of the Petition<br>of<br>NATIONAL FUEL GAS SUPPLY CORPORATION<br>for a Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1980 through 1986. | : | |

Upon the Division of Taxation's Notice of Motion for an order reopening the record of a hearing to permit the taking of evidence regarding matters at issue in connection with the matter of the petition of National Fuel Gas Supply Corporation, and upon the undated affirmation of Deborah J. Dwyer, Esq., in support of said notice of motion, together with exhibits annexed thereto, and upon the affidavit in opposition of David Rydholm, made November 11, 1991, together with exhibits annexed thereto and a brief in opposition submitted therewith, the following facts are found:

On December 6, 1989, a hearing was held before Timothy J. Alston, Administrative Law Judge for the Division of Tax Appeals, concerning the petitions of Penn York Energy Corporation ("Penn York") for a redetermination of sales and use taxes for the periods March 1, 1980 through November 30, 1981 (DTA Numbers 801098 and 801227) and National Fuel GasSupply Corporation ("Supply") for a redetermination of corporation tax for the years 1980 through 1986 (DTA Numbers 806344 and 806850).

One of the primary issues at the December 6, 1989 hearing involved Supply's sales of natural gas to Penn York for use as "base gas" in Penn York's natural gas storage business. Specifically, following its audit of Supply, the Division asserted tax pursuant to Tax Law § 186-a upon Supply's gross receipts derived from its sales of base gas to Penn York. The Division theorized that such receipts were taxable because the sales in question were for "ultimate consumption or use" in New York (see 20 NYCRR 502.3[a]). Additionally, following its audit of Penn York, the Division assessed use tax on Penn York's use of base gas in New York.

At the December 6, 1989 hearing, John Pustulka, Superintendent of the Gas Supply Department of National Fuel, testified with respect to the development and operation of Penn York's storage facilities and the use of base gas. Mr. Pustulka testified that when it closed a storage facility, "Penn York would remove the base gas as it - - as you would remove any remaining reserves in any production field." (Hearing Transcript at 33.) In addition, Mr. Pustulka indicated that if and when the storage facilities were closed the base gas would be removed through existing well facilities and sold to natural gas utilities for ultimate sale to the end users of that utility. (Hearing Transcript at 33-34.) On cross-examination, Mr. Pustulka indicated that Penn York had not yet faced the situation of closing a storage facility and removing the base gas. (Hearing Transcript at 34-35.) During the course of the hearing petitioners' witness was not asked whether all the base gas would be recoverable at the time Penn York closes a storage facility or whether any base gas had been or would be lost. (Hearing Transcript at 17-51.) In addition, according to the affidavit of Mr. Rydholm,[1] although the base gas issue was discussed many times throughout the course of related sales and use tax audits of National Fuel Gas Distribution Corporation ("Distribution"), Supply and Penn York, the section 186-a tax audit of Supply, and the numerous meetings and conferences held with respect to the

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[1]Mr. Rydholm is the manager of tax services of National Fuel Gas Distribution Corporation. Mr. Rydholm was the primary contact person for Distribution, Supply and Penn York on the sales and use tax audits conducted by the Division with respect to the periods March 1, 1978 through November 30, 1981 and December 1, 1981 through November 30, 1984 and on the section 186-a audit of Penn York for the calendar years 1980 through 1983.

resulting tax assessments, representatives of the Division of Taxation never raised the question of the potential loss or unrecoverability of a portion of the base gas purchased by Penn York. Similarly, at no time during the course of the audits or the hearing did Supply, Penn York or any of its representatives raise the issue of base gas losses in Penn York's storage facilities.

An administrative law judge determination in respect of the petitions of Penn York and Supply was issued on March 14, 1991. The determination concluded, among other things, that the receipts derived from Supply's sales of natural gas to Penn York for use as base gas in Penn York's storage facilities in New York were properly includable in Supply's gross operating income for purposes of Tax Law § 186-a.[2] Central to this conclusion was the finding, also set forth in the determination, that the sales of base gas to Penn York were for "ultimate consumption or use" by Penn York within the meaning of Tax Law § 186-a(2)(d):

> "By including sales for 'ultimate consumption or use' within the definition of gross operating income, the statute excludes from tax sales for resale (20 NYCRR 501.9[a]). Petitioner's sales to Penn York were clearly not sales for resale. Petitioner sold gas to Penn York for use in its storage operations as base gas. Penn York has used and will continue to use the base gas so purchased in its operations for an indeterminate period. At some future time, Penn York may close down its storage operations. At that, as yet, indefinite point in time, Penn York may sell the base gas to consumers for their consumption. The mere possibility that Penn York will sell the base gas to consumers at some indeterminate time does not transform petitioner's sales of base gas to Penn York into sales for resale. Similarly, the mere possibility that the gas may be burned by a user other than the purchaser at some indefinite future time does not result in excluding the receipts from the gas sales at issue from petitioner's gross operating income. Petitioner sold the gas in question to Penn York for use as base gas during the years 1980 through 1983. Penn York has continued to use the gas as base gas through the present time and plans to continue to use the gas as base gas through the present time and plans to continue to use the gas as base gas for an indefinite period. There is no evidence in the record to show that Penn York had, at any time relevant herein, an intent to resell the gas in question to consumers. Under such circumstances it must be concluded that petitioner's sales to Penn York were for Penn York's ultimate consumption or use within the meaning of the statute." (ALJ Determination, Conclusion of Law "M".)

Following the issuance of the administrative law judge determination petitioner Supply

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[2]Base gas is described in Finding of Fact "18" of the determination as follows:

> "'Base gas' is injected into a storage field during its development to build up the pressure necessary to remove other gas often referred to as 'top gas', during a withdrawal cycle."

filed an exception with the Tax Appeals Tribunal and took specific exception to the Conclusion of Law set forth above.

The Division became aware of certain facts regarding gas storage losses incurred by Penn York through an article which appeared in The Buffalo News on April 17, 1991. The article indicated that Penn York had suffered $21.6 million in gas storage losses over a three-year period. A copy of this article was transmitted to the Division's representative on or about August 8, 1991. The Division subsequently became aware of certain administrative proceedings before the Federal Energy Regulatory Commission (FERC) involving Penn York. Such proceedings were related to a rate request by Penn York and involved, among other matters, issues related to the question of natural gas losses incurred by Penn York at its storage facilities. The Division attached to its affirmation in support of the instant motion copies of FERC orders involving Penn York dated from January 31, 1991 through August 2, 1991. The FERC order dated May 2, 1991 (55 FERC P 61, 175) stated, in part, the following:

> "In its filing Penn-York stated that the costs it sought to recover were operating losses which it sought to amortize over a number of years, and it has introduced testimony to support that position. For example, Penn-York has stated that these are operating costs relating 'to operational storage losses over a number of years.' Penn-York also has stated that these are losses 'based on conclusions that were derived over several years of operational experience and verified over the last two years of operations.' Testimony was also presented stating that at least two of the storage pools concerned have reflected continual losses over the last eight storage cycles. Finally, Penn-York has admitted that it has been unable to find a specific cause for these losses and that it expects these losses to continue. These admissions are contrary to Penn-York's claims on rehearing that these losses are other than ordinary losses such as it has advanced from the outset in seeking recovery. Accordingly, we affirm our prior rejection of Penn-York's proposal to recover its past storage losses." (55 FERC P61, 175.)

In its affirmation in support of its motion the Division contended that facts concerning gas losses at the Penn York storage facilities were relevant to the determination of whether Penn York is or was the ultimate consumer or user of the base gas it purchased from Supply. The Division acknowledged that the newspaper article and FERC orders appeared to pertain to periods subsequent to the period at issue. The Division contended, however, that the issue of natural gas loss should properly be before the administrative law judge.

Opinion

In Matter of Jenkins Covington, N.Y., Inc. and Andrew Jenkins, Officer (Tax Appeals Tribunal, November 21, 1991) the Tribunal discussed the issue of reopening a matter that under law had finally determined the controversy between the Division of Taxation and petitioner therein.

> "As we have repeatedly held, we have no statutory authority to reconsider our decisions and in the absence of statute, our authority to reconsider our decisions is limited (Matter of Fisher, supra; Matter of Capitol Coin, Tax Appeals Tribunal, August 23, 1989; Matter of Goldome Capital Inv., supra). Our authority is limited, due to the long established principle, as articulated by the Court of Appeals in the case of Evans v. Monaghan, that '[t]he rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction, applies as well to the decisions of special and subordinate tribunals as to decisions of courts exercising general judicial powers (citations omitted). Security of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible' (Evans v. Monaghan, 306 NY 312, 118 NE2d 452, 457). Evans v. Monaghan establishes that it is appropriate to reopen an administrative hearing where one party offers important, newly discovered evidence which due diligence would not have uncovered in time to be used at the previous hearing (Evans v. Monaghan, supra). This standard is substantially the same as that developed under Rule 2221 of the Civil Practice Law and Rules for a motion to renew (CPLR 2221[a]). A motion to renew must be based upon additional, material facts which existed at the time the prior motion was made, but were not then known to the party and, thus, were not made known to the court (Foley v. Roche, 68 AD2d 558, 418 NYS2d 588, 594). The additional facts must be ones that could not have readily and with due diligence been made part of the original motion (Foley v. Roche, supra, 418 NYS2d 588, 594). The motion to renew should be denied if the party fails to offer a valid excuse for not submitting the additional facts upon the original application (Zebrowski v. Pearl Kitchens, ___ AD2d ___, 568 NYS2d 242; Barnes v. State of New York, 159 AD2d 753, 552 NYS2d 57, appeal dismissed 76 NY2d 935, 563 NYS2d 63; Foley v. Roche, supra, 418 NYS2d 588, 594). Because the basic standard established by Evans is similar to that under Rule 2221(a), we are guided by the case law under Rule 2221(a) and conclude that to obtain reconsideration of a Tribunal decision, the party must show that the newly discovered facts could not have been discovered with due diligence and the party must offer a valid excuse for not submitting the facts upon the original application." (Matter of Jenkins Covington, N.Y., Inc. and Andrew Jenkins, Officer, Tax Appeals Tribunal, November 21, 1991.)

Similar to the Tribunal, the authority for an administrative law judge to reconsider or re-open the record with respect to an issued determination is limited. The statutes and rules of practice and procedure generally do not provide for such reconsideration or reopening of the record. The rules do make an exception with respect to default determinations (see 20 NYCRR 3000.10[b]). In addition, the Tribunal may remand a matter back to an administrative law judge

to re-open a hearing (see, e.g., Matter of Petro Enterprises, Inc. f/k/a Dan's Grocery Corporation, Tax Appeals Tribunal, September 19, 1991) or to reconsider a determination (see, e.g., Matter of Air Flex Custom Furniture, Inc. and Emil Zambardi, as Officer, Tax Appeals Tribunal, September 12, 1991). Absent such specific and exceptional circumstances, however, the standard enunciated by the Tribunal in Jenkins Covington is properly applicable herein. Moreover, to apply a lesser standard for reconsideration or re-opening of a record would be inconsistent with the very purpose of the Tribunal's Rules of Practice and Procedure, i.e., "to provide the public with a clear, uniform, rapid, inexpensive and just system of resolving controversies with the Division of Taxation" (20 NYCRR 3000.0[a]). Certainly, a lesser standard would put at risk the integrity of the administrative hearing process.

Applying this standard to the instant matter it is clear that the Division has made no showing that the newly discovered facts, i.e., the possibility of base gas losses at Penn York's storage facilities during the audit period could not have been discovered with due diligence. The facts herein establish that the Division, during the course of extensive sales and corporation tax audits of Supply and Penn York and its cross-examination of Mr. Pustulka at the hearing, simply did not raise the issue of base gas losses. Having failed to even ask a question on this subject during the course of the audit or at hearing the Division cannot now plausibly claim that evidence regarding this issue could not have been discovered with proper diligence prior to or during the hearing. Moreover, the Division has not offered any excuse for its failure to introduce evidence on gas losses during the hearing. The fact that petitioner did not present evidence on gas losses to the Division during either the audit or at hearing does not constitute a valid excuse. As noted previously, petitioner was not asked to provide such evidence. It should also be noted that there is no evidence in the record that petitioner misled or hid evidence from the Division with respect to gas losses.

Accordingly, pursuant to the foregoing discussion, the motion of the Division of Taxation to reopen the record to permit the taking of evidence regarding matters at issue is denied.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE