STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETRO ENTERPRISES, INC. F/K/A DAN'S GROCERY CORPORATION	:	DETERMINATION
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period December 1, 1984 through April 30, 1987.	:	

Petitioner, Petro Enterprises, Inc., f/k/a Dan's Grocery Corp., 50 South Niagara Street, Lockport, New York 14094, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period December 1, 1984 through April 30, 1987 (File No. 806301).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on May 1, 1990 at 9:15 A.M. Petitioner appeared by Robert A. Zucco, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether a grade of kerosene, known as "K-1", constituted a diesel motor fuel under Tax Law former § 282-a.

II. Whether, as a result of an audit, the Division of Taxation properly determined additional diesel motor fuel tax due.

FINDINGS OF FACT

On July 31, 1987, following an audit, the Division of Taxation issued to petitioner,[1] Dan's Grocery Corp., Thrifty Oil Division, a Notice of Determination of Tax Due under Article 12-A of the Tax Law which assessed $54,868.67 in tax due, plus penalty and interest, for the period December 1, 1984 through April 30, 1987.

During the period at issue, petitioner, doing business under the name "Thrifty Oil", was engaged in the retail sale[2] of various petroleum products, including gasoline, diesel fuel, fuel oil, and kerosene. Petitioner was registered as a distributor of diesel motor fuel. Most of petitioner's fuel oil and kerosene sales were made by home delivery. Petitioner's facility was located at 63 Richfield Street, Lockport, New York and consisted of an oil tank farm and a retail service station. The retail station had a number of islands containing metered pumps through which product was sold to customers. One such island contained two metered pumps each designated "Diesel". These pumps were connected to an underground storage tank. This tank was supplied with product from petitioner's tank farm by petitioner's home heating oil delivery trucks. Another island contained a single metered pump which bore the designation "Fuel Oil" and indicated thereon "For Home Heat Only". This pump was fed directly from one of petitioner's large "tank-farm" oil tanks.

Petitioner also had a metered pump through which petitioner sold a grade of kerosene, known as K-1. This kerosene pump was fed by an above-ground 10,000 gallon tank. The kerosene pump bore a sign which stated: "Not For Use In A Diesel Motor Vehicle."

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[1]Petitioner subsequently changed its name to Petro Enterprises, Inc., and, in fact, filed its petition under its new name, but has continued to conduct business under the name "Thrifty Oil" (see, Finding of Fact "2").

[2]As used in this finding, retail sale refers to sales to ultimate consumers and not to the definition of "retail sale" contained in Tax Law former § 282-a.

All of petitioner's metered pumps were self-service and all were accessible to motor vehicles. All pumps were electronically connected to a console controlled by petitioner's cashier. The cashier, stationed in a small building nearby, could observe all activity at the pumps, and could, by operating the console, turn off any of the pumps at any time.

The product sold through the pumps designated "Diesel" and "Fuel Oil" was identical during warm weather months. In colder weather, the product sold through the "Diesel" pumps was blended with an additive by petitioner to prevent the product from gelling.

Petitioner collected and remitted tax due under Article 12-A with respect to sales made through the pumps designated "Diesel". Petitioner did not collect tax under Article 12-A with respect to any sales made through the fuel oil or kerosene pumps.

On audit, the Division reviewed petitioner's purchase and sales records. Based upon its review of such records, the Division concluded that petitioner properly collected and reported diesel motor fuel tax with respect to substantially all of the 226,284 gallons of fuel sold through the pumps designated diesel. The Division also reviewed invoices documenting residential fuel sales and concluded that petitioner had sufficiently documented sales of diesel fuel by home delivery (such sales being for home heating purposes and thus not subject to tax under Article 12-A). With respect to sales made through the fuel oil and kerosene pumps, the Division requested documentation of specific sales. Petitioner did not maintain documentation of any specific sales. Petitioner did maintain daily pump readings which showed daily totals of gallons sold through each pump. The Division concluded that, in the absence of documentation of specific nontaxable sales, all sales through the fuel oil and kerosene pumps were properly subject to diesel motor fuel tax. The Division used petitioner's records of daily pump readings and determined that petitioner sold 210,389 gallons of fuel oil and 337,978 gallons of kerosene during the audit period. The Division assessed diesel motor fuel tax of ten cents per gallon on these sales and issued the assessment in dispute herein.[3]

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[3]The Division also assessed $31.97 in tax on petitioner's underreporting with respect to 319.7 gallons of fuel sold through the "Diesel" pumps during the audit period. This part of the assessment was not contested.

Petitioner conceded that fuel oil and kerosene were sold in the total amounts determined by the Division, but took the position that all such sales were nontaxable under Article 12-A.

Petitioner's retail station was open from 7:00 A.M. to 7:00 P.M.

As noted previously, petitioner's kerosene pump sold K-1 kerosene. This grade of kerosene has a low sulphur content and is cleaner burning than regular kerosene. K-1 kerosene is commonly used in space heaters.

Petitioner sold some amount of kerosene and fuel oil from the pumps in question which was dispensed into portable containers.

CONCLUSIONS OF LAW

A. During the period at issue, Article 12-A of the Tax Law, specifically Tax Law former §§ 282-a, 282-b and 282-c, imposed a tax of ten

cents per gallon on retail sales of diesel motor fuel. Under the system of diesel motor fuel taxation in place at that time,[4] Tax Law former § 282-a defined the following terms, in relevant part, as follows:

> Diesel motor fuel: "[K]erosene, crude oil and motor fuel commonly used in the operation of an engine of the Diesel type."
>
> Diesel motor fuel distributor: "Any person who makes retail sales of Diesel motor fuel in [New York]".
>
> Retail Sale: "[M]aking or offering to make any sale to a consumer of [Diesel motor] fuel which is delivered directly to a motor vehicle for its operation on the public highways."

B. As Tax Law former § 282-a clearly stated, kerosene is included within the definition of diesel motor fuel. K-1 kerosene is a particular grade of kerosene. The Division therefore properly considered petitioner's sales of K-1 to be sales of diesel motor fuel under former

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[4]Article 12-A was substantially revised by Laws of 1988 (ch 261). Under this law, the incidence of diesel motor fuel taxation was shifted from the point of the retail sale to the point of the first sale or use in New York.

section 282-a.

The testimony of petitioner's president, to the effect that K-1 kerosene could not be used in a diesel-type engine, is insufficient to establish petitioner's contention that K-1 should not be considered diesel motor fuel.

With respect to this contention, the record does not establish petitioner's president as expert in either diesel engines or motor fuels commonly used in the running of such engines. Moreover, petitioner's president's testimony did not even address the issue of whether K-1 could be used in combination with other petroleum distillates in the operation of a diesel engine. Thus, even accepting petitioner's questionable

interpretation of the statute, petitioner has nonetheless failed to show that the K-1 sold by petitioner did not constitute diesel motor fuel within the meaning of Tax Law former § 282-a.

C. Tax Law former § 285-a presumed that all diesel motor fuel[5] sold in New York was subject to tax imposed under Article 12-A and placed the burden of proving otherwise upon the distributor.

To establish that its sales through the fuel oil and kerosene pumps were not retail sales as defined under Tax Law former § 282-a, petitioner offered photographs of the pumps in question, the testimony of its president, and an employee who formerly worked as a cashier at petitioner's station. Petitioner also submitted an affidavit from a current employee who also works as a cashier at the station. This evidence established that the pumps bore certain designations (see Finding of Fact "2"). The evidence also established that petitioner sold some amount of kerosene and fuel oil through the pumps in question where the customer dispensed the product directly into portable containers (see Finding of Fact "10"). This evidence is insufficient, however, to establish petitioner's ultimate contention that all of the kerosene and

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[5]Tax Law former § 285-a made reference only to "motor fuel" and not to "diesel motor fuel". Pursuant to Tax Law former § 282-a, however, "other sections [of Article 12-A] shall apply to Diesel motor fuel as well as to other motor fuels."

fuel oil sold through these pumps was dispensed into portable containers and that about 90% of such sales were of 15 gallons or less.

As a distributor of diesel motor fuel petitioner was required under Tax Law former § 286 to "keep a complete and accurate record of all purchases

and sales or other dispositions" of diesel motor fuel.[6] Petitioner maintained no records of individual sales made through the kerosene and fuel oil pumps. There is thus no direct documentary evidence to prove the purportedly exempt sales. Moreover, the testimonial evidence presented herein to establish such exempt sales was unpersuasive. Specifically, with respect to petitioner's contention that 90% of the sales were of 15 gallons or less must be accorded little weight, as it appears to be purely speculative. Also, the contention that all sales through the pumps were dispensed into portable containers rests upon the assertion by the witnesses and the affiant that none of the three ever saw a customer dispense product from the fuel oil or kerosene pumps into a motor vehicle. Even assuming the accuracy of the witnesses' recollections, there is no evidence to suggest that these three individuals observed all sales from these pumps during the period in question. Further, it is noted that petitioner sold a total of 548,367 gallons through the fuel oil and kerosene pumps and 226,284 gallons through the diesel pumps. Thus, if one were to accept petitioner's contentions, petitioner sold nearly two and one-half times as much diesel motor fuel into portable containers than was dispensed into motor vehicles.

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[6]It is noted that petitioner contended that section 286(1) did not require that it maintain records in respect of the sales in question. Petitioner pointed to the last sentence of the statute which provides that "[n]othing in this section...shall be construed to require the keeping of a record of...sales of...diesel motor fuel...at retail in small quantities." Petitioner's contention is rejected. The statute requires that petitioner maintain a "complete and accurate record of all purchases and sales" of diesel motor fuel (see Matter of Petroleum Sales and Service, Inc. v. Bouchard, 98 AD2d 882, 470 NYS2d 865, affd 64 NY2d 671, 485 NYS2d 252). This statute certainly did not permit a distributor, such as petitioner, to maintain no records in respect of its sales of 548,367 gallons of fuel. Such an interpretation runs contrary to the intent of the recordkeeping requirement of this section.

While not dispositive of the instant matter, this relative degree of sales activity certainly raises a question as to the accuracy of petitioner's contentions and must weigh against such contentions.

Although petitioner did show that it made some amount of nontaxable sales (see Finding of Fact "10"), in light of the foregoing it must be concluded that petitioner failed to identify any specific nontaxable sales and clearly failed to show that all of the disputed sales were nontaxable. Petitioner thus failed to meet its burden imposed under Tax Law former § 285-a and the sales in question were properly presumed taxable pursuant to the same section.

D. The petition of Petro Enterprises, Inc., f/k/a Dan's Grocery Corp., is denied and the Notice of Determination of Tax Due, dated July 31, 1987, is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE