STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NATIONAL LUBRICANTS, INC. D/B/A AMERICAN CONTINENTAL OIL	:	DETERMINATION DTA NO. 807201
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Year 1986.	:	

Petitioner, National Lubricants, Inc. d/b/a American Continental Oil, 141 Milton Street, Buffalo, New York 14210 filed a petition for redetermination of a deficiency or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the year 1986.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on July 9, 1991 at 9:15 A.M. All briefs were to be submitted by February 14, 1992. Petitioner submitted its brief on December 26, 1991. The Division of Taxation, by letter of January 3, 1992, declined to submit a brief. Petitioner appeared by its president, William R. Barnes, and the Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner is properly subject to the tax on petroleum businesses imposed by Tax Law Article 13-A ("gross receipts tax").

II. Whether the tax imposed under Article 13-A of the Tax Law is applicable to petitioner's sales to Seneca Indians or businesses operated by such Indians upon the Seneca reservation within the State of New York.

III. Whether petitioner has shown that certain of its sales qualified for a residential use

exclusion from the gross receipts tax.

FINDINGS OF FACT

1. Petitioner, National Lubricants, Inc., is a New York corporation engaged in the sale and importation of home heating fuel and diesel motor fuel, petroleum products and gasoline as well as the pickup of waste oils. The company was incorporated in New York State in January 1981. Prior to 1985, the company was a lubricating oil business which manufactured, compounded and mixed additives and base oils to produce transmission oils for automobiles. Petitioner discontinued its lubricating business activities and began its current practice of selling and importing home heating and diesel motor fuel in 1985.

2. On March 4, 1987, Kevin Karr from the Division of Taxation ("Division") began an audit at petitioner's Buffalo office. The original audit was a truck mileage and fuel use tax audit which is not in dispute. Through an examination of petitioner's fuel invoices, sales invoices, freight bills and packing invoices, the auditor discovered that petitioner was going to locations outside of New York State and picking up petroleum products for sale in New York locations. The auditor determined that petitioner was an Article 13-A distributor subject to tax under such article of the Tax Law. This tax, imposed upon the vendor, is applicable to anyone who engages in the process of importing, or causing to be imported, petroleum products into New York State for sale in New York State. At the time of the original audit, petitioner was not a registered Article 13-A distributor as required by the Tax Law and had not been paying Article 13-A taxes on its imported fuel. Petitioner registered as an Article 13-A distributor with the help of Kevin Karr in 1987.

3. The Division submitted into evidence a list of workpapers tracing the fuel from the suppliers at the locations out of state to the actual delivery points within New York State. The workpapers list the names of companies who supplied products to petitioner. These suppliers include Rogers Fuel Corporation in Rochester, New York; Comtrade Petroleum, Inc. in Brooklyn, Ontario; United Refining Company in Warren, Pennsylvania; and Kendall Refining Division in Bradford, Pennsylvania. Petitioner purchased the fuel primarily from Rogers Fuel Corporation. The Division discovered, through a review of the sales invoices, that the seller

(Rogers Fuel Corporation) would give petitioner a release order number which would be communicated to the seller's depot in Pennsylvania. Typically, B.B. Mast, a transportation company hired by petitioner, would pick up the product in Pennsylvania and have it transported across New York's border.

4. Petitioner primarily sold its fuel products to the Seneca Indians. After importation into New York State, the petroleum would either be delivered directly to its customers on the Seneca Reservation or delivered to petitioner's Buffalo facility where it stored the product in bulk until its delivery to Seneca or Tuscarora customers. Petitioner's president, William Barnes, testified that Timothy Toohey, an attorney representing several Indian reservations, informed him that National Lubricants could sell its fuel products to the reservations exempt from the gross receipts tax imposed by Article 13-A. The auditor testified that petitioner could show an exemption from the gross receipts tax only by providing the Division with certain export certificates showing an out-of-state sale which, petitioner testified, the Senecas were unwilling to supply.

Petitioner, with the help of a professional accountant, prepared and submitted three six-column worksheets which show the amount of Number 2 fuel sold upon which gross receipts tax was not paid. These worksheets show that for the year 1986, gross sales amounted to a total of $476,537.07. This figure was broken down into sales to Indians and non-Indians, respectively, as $416,284.69 and $60,252.38.

5. Tax Law Article 13-A provides for an exemption from tax for Number 2 fuel, or home heating fuel, which is used for residential use. According to Karr's testimony, both diesel fuel and home heating fuel are classified as Number 2 fuel. The auditor testified that companies often distinguish between taxable and nontaxable fuel by specifying whether the Number 2 fuel is diesel or home heating fuel, the latter being nontaxable if used for residential purposes. During the audit, petitioner supplied the Division with an Estimate Residential Use Certificate which names the buyer as the Seneca Nation of Indians, with Barry Snyder from the Cattaraugus Indian Reservation as its agent. It lists an estimated purchase of six million gallons

of Number 2 oil and two million gallons of kerosene for the period June 30, 1986 through June 30, 1987. The form contained a space for the seller's name and address which was left blank. The form was signed by Barry Snyder and dated June 30, 1986. Underneath the signature line was the statement: "THIS FORM MUST NOT BE USED IN LIEU OF THE RESIDENTIAL USE CERTIFICATE, Form CT-13AH". Kevin Karr testified that the purpose of this estimated certificate is "just to give the supplier an idea of how much fuel they'll be selling to a certain individual for residential use. At the end of the year the State needs the correct certificate, which is the CT-13AH". Petitioner could not obtain the form CT-13AH from the Seneca Indians. William Barnes testified that his Indian customers vehemently disagreed with the Division's interpretation of the tax under Article 13-A and refused to provide the necessary exemption certificates because they were an independent sovereign nation not subject to the imposition of this New York tax. Because of petitioner's inability to provide the Division with the correct form CT-13AH, the auditor rejected the estimated certificate and held all of the sales to Indians subject to Article 13-A tax.

6. Petitioner also attempted to provide the auditor with other documentation to show tax exemption for sales to non-Senecas through resales to other Article 13-A distributors and through sales of home heating fuel for residential use. Petitioner provided a group of certificates which were not accepted by the auditor for exemption purposes because there were no 13-AR certificates which, the auditor testified, were the only certificates the Division accepts to show a resale to another Article 13-A distributor.

7. Without the proper certificates, the Division found all of petitioner's sales to be subject to tax under Article 13-A of the Tax Law. The auditor calculated tax due by using a two and three quarter percent tax rate on the total sales figure of $476,537.07. On April 26, 1988, the Division issued a Notice of Deficiency to petitioner. For the year 1986, the Division asserted $13,104.69 in tax due and $1,174.08 in interest with $3,276.17 in additional charges (penalty) for a total due of $17,554.94.

8. On Thursday, October 20, 1988, a conciliation conference was conducted, and an

order was issued on April 28, 1989 denying petitioner's requested relief. At the conference, petitioner asserted its exemptions for sales to non-Indians because those sales were, purportedly, sales of home heating oil for residential use. Kevin Karr testified that it "became evident that he [petitioner] was selling home heating oil to companies that were in the trucking business" which indicated that petitioner was selling number two fuel to these companies as diesel fuel rather than home heating fuel which precluded any exemption under Article 13-A. Combined with petitioner's inability to produce the resale certificates, the conciliation conferee deemed the sales taxable. The conferee also rejected petitioner's claim that the sales made on the Seneca Reservation were tax exempt. The Notice of Deficiency was, thus, sustained.

9. A petition was filed with the Division of Tax Appeals on July 31, 1989 in which petitioner requested abatement of tax, interest and penalties on sales to Indian and non-Indian consumers. At the hearing and in its post-hearing memorandum, however, petitioner conceded that "where New York law applies" it is responsible for the tax imposed on sales to non-Indians.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner contends that Rogers Fuel Corporation caused the product to be imported into New York State and is, consequently, the responsible party for the tax. Petitioner argues that, pursuant to Uniform Commercial Code § 2-401(3), if a seller is to deliver a document of title, then title passes upon the document's delivery. If the goods are, at the time of contracting, identified and no documents are delivered, title passes at the time and place of contracting. In either situation, petitioner believes, title passed to petitioner in New York. It is petitioner's position that where it purchased the fuel through a contract in New York State, it was not responsible for the tax under Article 13-A because the title passed in New York State rather than in Pennsylvania. Since Rogers caused the importation into New York, it is properly subject to tax under Article 13-A.

Petitioner further contends that certain Federal statutory authority, referred to as the Indian Trader statutes (25 USC § 261) preempts the taxation of its sales to Indians under

Article 13-A. Petitioner asserts that its case is analogous to Central Machinery Company v. Arizona State Tax Commission (448 US 160, 65 L Ed 2d 684) where the Supreme Court held that the existence of the Federal Indian Trade statutes preempted the imposition of a similar tax on the vendor. The tax, even though facially imposed upon the vendor, eventually passes to the consumer in the form of increased costs. Because the tax reflects an increased cost to Indians, it acts as a burden upon Indian trade and is, therefore, rendered invalid with respect to sales to Indians upon Indian reservations. Petitioner asserts that while it sold imported fuel products within New York's geographical borders, the sales are not taxable because they are not subject to New York State regulations unless they can escape preemption by the Indian Trade laws. Relying, again, on Central Machinery Company (supra), petitioner contends that the Indian Trader statutes evinced such a strong Congressional intent with respect to Indian sales that no room remained for state laws imposing additional burdens on Indian trade.

Finally, petitioner argues that, even if the tax is not preempted by Federal law, the tax should be abated because it provided sufficient residential use certificates to prove that its customers were using the product as home heating fuel for residential purposes. Petitioner asserts that it accepted the estimated certificates in good faith and could not force the purchasers to provide additional final certificates.

11. The Division maintains that petitioner, rather than Rogers Fuel Corporation or its other suppliers, is responsible for the tax because title passed to petitioner in Pennsylvania before it was transported into New York State. Rogers Fuel Corporation, which purchased the fuel out of state and immediately sold it to petitioner, acted merely as an agent for petitioner. Petitioner, ultimately, imported, or caused to be imported, the petroleum into New York State for sale in New York locations. The Division concedes that if Rogers Fuel Corporation purchased the fuel, brought it into New York State, and then sold it to petitioner, it would be the responsible party. For the petroleum at issue, however, Rogers did not import the fuel but sold it to petitioner in Pennsylvania who subsequently transported it across the border.

The Division asserts that the sales to Indians are subject to the Article 13-A gross receipts

tax because the tax is not an excise or sales tax which is imposed directly upon the consumer. This particular tax, rather, is a franchise tax imposed upon the individual bringing the fuel into New York State for the privilege of doing business in the State of New York. Certain exemptions are available and the Division contends that petitioner has the burden of proof to show that it sold the fuel for residential use or that it exported the fuel for sale outside of New York State. Because petitioner could not supply the residential use or exportation certificates, it did not meet its burden of proof in reference to either exclusion. The Division also denies that there is adequate proof that sales were actually made to Indians. The Division, therefore, believes that the entire amount of tax assessed should be sustained.

CONCLUSIONS OF LAW

A. Tax Law § 301(a) states. in pertinent part:

> "there is hereby imposed upon every petroleum business, for the privilege of engaging in business...for all or any part of each of its taxable years, an annual tax equal to two and three-quarters per centum of (i) its gross receipts from sales of petroleum where shipments are made to points within the state, and (ii) the consideration given or contracted to be given by it for petroleum which it imported or caused to be imported (by a person other than one which is subject to tax under this article) into this state for consumption by it in this state."

Petitioner contends that it is not subject to the tax because it took title to the petroleum within New York State borders. Whether or when petitioner took title to the petroleum, however, is irrelevant based on the language of the statute. The statutory language requires that the tax be imposed upon the party who "imported or caused to be imported" petroleum products into New York State (Tax Law § 301[a]).[1] Petitioner sought the purchase of the fuel from Rogers Fuel

[1]Moreover, Article 13-A makes an exclusion from tax for "any sale for resale to a purchaser which is a petroleum business subject to tax under this article"(Tax Law § 303[b][2]). Rogers Fuel Corporation purchased the fuel and actually resold it to petitioner who is a petroleum business as defined under Article 13-A. At the time of its purchase transactions, petitioner was not a registered Article 13-A distributor and was unable to provide Rogers Fuel Corporation or its other suppliers with the proper resale certificates as required by this statute to show the companies' exemptions. Since petitioner has subsequently registered and conceded to be an Article 13-A distributor, it may be inferred that such an exemption existed for the suppliers which enhances petitioner's responsibility for the tax.

Corporation and hired an independent transportation company to carry the fuel across the New York State border from Pennsylvania. Clearly, petitioner imported, or caused to be imported, the petroleum into New York State.

B. The statutory language is clear and unambiguous and requires that the tax be imposed upon the individual or entity responsible for importation. Pursuant to New York law, "where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation" (McKinney's Cons Laws of NY, Book 1, Statutes § 76). Petitioner, therefore, is erroneous in its assertion that the passing of title is relevant. The statute does not say that title must pass out of state in order for the tax

to be imposed upon the vendor, nor may it be inferred from the statutory text. It is clear that this statute was enacted with the purpose of taxing the vendor who actually brings the product across the state borders for the privilege of selling out-of-state petroleum within New York State. Rogers Fuel Corporation acted as a vehicle through which petitioner was able to import the fuel. Without petitioner's request to purchase, Rogers Fuel Corporation would not have had reason to import the fuel. It, in fact, stored the fuel in Pennsylvania and made no offer to transport it. It was petitioner's option to import the fuel into New York State. Rogers Fuel Corporation had no control over or interest in where or how petitioner opted to use the fuel. The Division, thus, properly determined that petitioner is the responsible party for the tax imposed by Article 13-A.

C. Having determined that petitioner is properly subject to the gross receipts tax, the next question is whether that tax is applicable to sales made to Indians on Indian reservations. The Division argues that petitioner's sales are properly subject to the gross receipts tax because, unlike a sales or excise tax, the tax is imposed upon the vendor rather than the customer. The tax imposed under Article 13-A, however, is analogous to the tax imposed by the Arizona Tax Law in Central Machinery Company v. Arizona State Tax Commission (supra). In that case,

Arizona imposed a transaction privilege tax, which amounted to a percentage of the gross receipts of the taxable entity, against a corporation selling farm tractors to the Gila River Indian Tribe. The Supreme Court found that the Federal Indian trader statutes (25 USC §§ 261-264) governed the sales transaction. The state regulations, therefore, were preempted by the Federal law. (See also, Warren Trading Post Co. v. Arizona Tax Commn., 380 US 685, 14 L Ed 2d 165.) The Court went on to declare that,

> "by enacting these statutes Congress has 'undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.' It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them 'a sweep as broad as [their] language.' United States v. Price, 383 US 787, 801, 16 L Ed 2d 267, 86 S Ct 1152 (1966), and interpret them in light of the intent of the Congress that enacted them (Central Machinery Company v. Arizona State Tax Commn., supra, at 166).

The gross receipts tax imposed by Article 13-A is a prime example of an "all inclusive" provision which the Federal Indian Trader Statutes preempts (Central Machinery Company v. Arizona State Tax Commn., supra, citing Warren Trading Post v. Arizona Tax Commn., supra). The State lacks the authority to impose restrictions and regulations which interfere with Indian trade, even if the regulation does not appear to be overly burdensome. Chief Justice John Marshall recognized that "'[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union'"(Warren Trading Post Co. v. Arizona Tax Commn., supra, at 688, citing Worcester v. Georgia, 6 Pet [US] 551, 557, 8 L Ed 483, 500). The law imposed under Article 13-A, while not directly imposed upon the Indians, is a franchise tax analogous to those that the Supreme Court found were preempted by the Federal Indian trader statutes. In spite of its imposition upon the vendor, it nevertheless represents a New York State restrictive regulation which would place financial burdens upon petitioner, or the Indians with whom it deals, and may thereby disturb the statutory plan enacted

by Congress (see, Warren Trading Post v. Arizona Tax Commn., supra). In light of the Supreme Court's interpretations of the Federal Indian trade statutes, New York law may not govern the imposition of taxes on the sale of imported fuel to Indians on Indian reservations.

Likewise, in a case remanded to the New York Court of Appeals by the U.S. Supreme Court where it was determined that taxation of an out-of-state motor fuel distributor's sale of fuel to Indian retailers on reservations was preempted by Federal Indian trader laws, the court stated in support of its decision:

> "that under Federal statutes, and the Supreme Court decisions construing them, the State's action imposed an impermissible burden upon trade with reservation Indians, an area preempted by Federal law..." (Herzog Brothers Trucking v. State Tax Commn., 72 NY2d 720, 724, 536 NYS2d 416, 418).

The court in Herzog (supra) "rested on the Supremacy Clause and the preemption by the Federal Government of the regulation of Indian traders" (id., citing Central Mach. Co. V. Arizona Tax Commn., [supra] and Warren Trading Post v. Arizona Tax Commn., [supra]). In light of these decisions, petitioner may not be held subject to gross receipts tax upon its sales to Indians.

D. The Division asserts that Petitioner needs certain export certificates in order to show that the sales were not made within New York State. Tax Law § 303(b)(4) provides for an exemption from tax if the petroleum is sold for immediate exportation from New York for sale outside New York. The statute, however, requires export certificates as proof of the sale and exportation. The Division argues that the necessity for export certificates applies in this case as well. This requirement, however, represents another restrictive regulation on Indian trade. Since "federal legislation has left the State with no duties or responsibilities respecting the reservation Indians", New York may not impose this requirement upon petitioner (Warren Trading Post v. Arizona Tax Commn., supra at 691). The workpapers, prepared and submitted by the Division, adequately show sales invoice numbers with the corresponding Indian customers and gross sales figures which the Division does not dispute. Moreover, petitioner's six column worksheet, prepared with the help of a professional accountant, shows invoice numbers with corresponding Indian and non-Indian customers which break down petitioner's Indian and non-Indian sales. Petitioner's showing of gross sales to Indians in the amount of

$416,284.69 is, thus, adequately shown.

E. Tax Law § 303(b)(1) provides for an exclusion from the gross receipts tax for sales of certain fuel oil used for residential purposes. The purchaser must furnish the petroleum business with what has been referred to as a "residential use certificate". Although it has already been concluded that petitioner is not subject to tax upon its gross sales to Indians, petitioner was not able to supply the requisite residential use certificates in order to show that its sales to non-Indians fell into the residential use exception provided for in Tax Law § 303(b)(1). Thus, petitioner remains subject to the gross receipts tax on sales in the amount of $60,252.38.

F. The Petition of National Lubricants d/b/a/ American Continental Oil is granted to the extent determined in Conclusions of Law "C" and "D", and the Notice of Deficiency dated on April 26, 1988 is to be modified consistent with Conclusion of Law "E".

DATED: Troy, New York
October 29, 1992

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE