STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUPREME PETROLEUM COMPANY OF NEW JERSEY, INC.	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1986 through May 31, 1989.	:	DTA NO. 811486

Petitioner, Supreme Petroleum Company of New Jersey, Inc., P.O. Box 756, Somerville, New Jersey 08876, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1986 through May 31, 1989.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 9, 1993 at 11:45 A.M., with all briefs to be submitted by January 4, 1994. Petitioner, appearing by Tedd S. Levine, Esq., submitted its brief on November 4, 1993. The Division of Taxation, appearing by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel), did not submit a responding brief. Consequently, petitioner did not submit a reply brief.

ISSUE

Whether petitioner has established that tax has been paid with respect to its sales of certain automobiles.

FINDINGS OF FACT

Petitioner, Supreme Petroleum Company of New Jersey, Inc. d/b/a Downs Auto Rental and Leasing, is, and was during the period in question, primarily engaged in the business of leasing motor vehicles to individuals and businesses. Petitioner also sold these motor vehicles to its lessees orto others, at the time of termination of the various leases. Petitioner's only

business premises are located in Morristown, New Jersey. However, petitioner also does business in New York, Pennsylvania, Connecticut, Florida, North Carolina and California. Petitioner is a registered vendor for New York sales tax purposes.

Beginning in the summer of 1989, the Division of Taxation ("Division") conducted a sales and use tax audit of petitioner's business for the period September 1, 1986 through May 31, 1989. The Division reviewed petitioner's books and records and found the same to be adequate for purposes of conducting a detailed audit based thereon. This conclusion was communicated to and discussed with petitioner, after which petitioner executed an Audit Method Election Form. Pursuant to such election, petitioner consented to have the audit conducted based on a detailed review of its records for a test period, with the results projected over the entire period under audit in order to determine petitioner's liability, if any, for such audit period. The agreed upon test period spanned March 1, 1989 through May 31, 1989.

The auditor's review of petitioner's records for the test period revealed, inter alia, sales of seven vehicles to purchasers with New York State addresses. Petitioner's records also revealed that petitioner had not collected sales tax with respect to such sales.

On May 30, 1990, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1986 through May 31, 1989 in the amount of $52,398.74, plus interest.[1]

Petitioner and the Division engaged in various post-assessment meetings, resulting in a reduction of the amount assessed from $52,398.74 to $41,110.77. Petitioner also requested and was granted a conciliation conference before the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On September 25, 1992, BCMS issued Order No. 108338 pursuant to which the amount of tax at issue was reduced from $41,110.77 to $22,512.64, plus interest. Further, at the commencement of proceedings herein, petitioner admitted that

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[1]The record includes a validated consent with respect to the period of limitations on assessment under which sales and use taxes for the period September 1, 1986 through February 28, 1987 could be assessed at any time on or before September 20, 1990.

$6,519.49 out of such $22,512.64 amount was not challenged or at issue, and represented tax due based on "clerical errors" made by petitioner. Therefore, remaining at issue in this proceeding is $15,993.15, consisting entirely of sales tax allegedly due on petitioner's sales of vehicles.

Petitioner was able to establish, prior to hearing, that tax had been paid with respect to five out of the seven vehicles sold to New York addressees during the test period. More specifically, tax was paid by the purchasers when such vehicles were (subsequently) registered in New York. However, payment of tax remains unproven as to the remaining two vehicles. The parties agreed at hearing that the mathematical calculation of the dollar amount remaining at issue ($15,993.15) results from a percentage projection based on the tax due on such two vehicles over the entire period

of audit, with such calculation not at issue. Rather, what remains at issue is whether petitioner has established that tax has been paid on such vehicles or, if not, whether petitioner may be excused from its responsibility to collect the tax with respect to such vehicles.

Petitioner admits that sales tax was not collected at the time of sale with respect to the vehicles in question. Rather, petitioner claims that upon the sale of a vehicle to be registered outside of New Jersey, the document related to the sale (apparently either the certificate of title and/or sale invoice) was stamped with the phrase "sales tax not collected". Petitioner maintains this procedure was used consistently with respect to all states in which it did business, claiming that it had no knowledge or reason to have knowledge that a particular vehicle would end up registered, as is relevant here, in New York. Petitioner does not dispute that it should have collected tax with respect to the vehicles at issue. Rather, petitioner maintains it was ignorant of its responsibility to do so during the period in question. In fact, immediately subsequent to the audit, petitioner revised its procedures such that it now collects tax on all of such sales transactions.

In an effort to ascertain whether tax had been paid upon registration of the vehicles held

taxable on audit, petitioner attempted to obtain information from the New York State Department of Motor Vehicles ("DMV"). This effort included the service of a subpoena upon DMV on or about December 9, 1991.[2] In response to the subpoena, petitioner's former attorney received a letter from DMV dated December 13, 1991 indicating that in order to receive sales tax information a request should be made to the New York State Department of Taxation and Finance, Centralized Photo Unit, Building #8, W. A. Harriman Campus, State Campus, Albany, New York 12227. This letter further specified that DMV "will discontinue to provide requestors with sales tax information." There is no evidence in the record that petitioner attempted any further enforcement efforts with respect to the subpoena served on DMV, or that petitioner made any attempts to obtain information from the Department of Taxation and Finance at the address indicated in the correspondence received from DMV.

During the course of the BCMS conference, the conferee allegedly indicated that he would attempt to obtain information with regard to the two vehicles in question. At hearing, three pages (pages 2, 3 and 4) of a Division "EDP Audit Bureau Motor Vehicle Payment File" were offered as evidence. These three pages are dated July 13, 1992 and indicate the time as 11:11-11:12 (presumably the time of inquiry via computer). Page 2 reflects the payment of tax with respect to an automobile registered by one Evelyn M. Sulibit. At hearing, it was confirmed that this automobile was one of the seven vehicles at issue on audit, that the Division's auditor allowed credit based on the payment of tax, and that such credit resulted (in part) in the described BCMS ordered reduction to the notice of determination (see, Finding of Fact "5"). The other two pages provide the following

[2]Petitioner's efforts in this regard are described in an affidavit made by petitioner's former counsel and attached to petitioner's brief. The submission of this affidavit and a copy of the subpoena, though post-hearing, was not contested by the Division. Given that the same items were discussed in general terms at hearing, and have not been objected to, they are accepted as part of the record.

information:

at Page 3:	Taxpayer name - Elizabeth Schreiber 350 Pennsylvania Avenue Freeport, NY 11520 Identification Number: 1LJBP96F4FY652504 Tax paid: Zero
at Page 4:	"No records found for these VIN codes 1LTBP96F1FY651505"

The auditor's workpapers show the two vehicles remaining at issue were sold to Elizabeth Schreiber and to Robert and Elizabeth Schreiber, respectively, with each vehicle sold at an invoice amount of $9,800.00. The vehicle identification numbers for these vehicles are, respectively, 1LJBP96F4FY652504 and 1LTBP96F1FY651505 (matching the vehicle identification numbers shown on the Division's EDP Audit Bureau Motor Vehicle Payment File).

Petitioner's Exhibit "1" in evidence is a sales invoice with respect to the sale of a 1985 Lincoln Town Car, number 1LJBP96F4FY652504, to Elizabeth Schreiber with a listed address of 350 Pennsylvania Avenue, Freeport, New York 11520. This invoice, dated April 24, 1989, indicates a selling price of $9,800.00 for the vehicle and, under the area of the invoice reserved for New Jersey sales tax, includes the handwritten abbreviation "NY" (New York). There is no amount shown as sales tax collected by petitioner on this sale.

Attached to petitioner's brief as Exhibit "A" is a vehicle lease agreement indicating the lease of a 1985 Lincoln Town Car Limousine, vehicle identification number 1LTBP96F1FY651505 to Robert Schreiber and Elizabeth Schreiber, 350 Pennsylvania Avenue, Freeport, New York 11520. In the area reserved for tax there is the typed legend "NY Exempt". This lease agreement is undated. The auditor's workpapers show the invoice date with respect to both vehicles as April 1989.

Although there is some testimony to the effect that petitioner utilized a stamp with respect to sales of vehicles stating "Sales Tax Not Collected" (see, Finding of Fact "7"), the evidence does not include examples where such stamped legend appears (e.g., on sales invoices or photocopies of certificates of title). Rather, the evidence regarding sales tax is, as described,

comprised of a handwritten notation abbreviating New York ("NY") and/or the typed legend "NY Exempt".

SUMMARY OF THE PARTIES' POSITIONS

Petitioner points out, and it is undisputed by the Division, that where petitioner did collect New York tax from a customer (i.e., with respect to vehicles leased to New York residents), the amount of tax collected was remitted. Petitioner also points out, and again it is undisputed, that its records were complete and adequate and that petitioner was cooperative during the course of the audit. Petitioner maintains that the Division, and also DMV as an agent of the Commissioner of Taxation and Finance, has an obligation to aid petitioner in ascertaining the facts of its case. More specifically, petitioner argues that DMV's failure to assist petitioner in obtaining all information regarding registration and payment of tax with respect to the vehicles in question effectively blocked petitioner's ability to gain access to necessary information. In this regard, petitioner argues that if the vehicles have been registered in New York, then tax should have been collected and the Division is attempting to collect tax twice with respect to the same sales. In contrast, petitioner notes that if the vehicles have been registered without the payment of tax, the same represents a failure of duty by DMV which failure constitutes negligence damaging petitioner to the extent of the tax not so collected.

CONCLUSIONS OF LAW

A. Tax Law §§ 1131(1) and 1132(a) provide that vendors of tangible personal property are responsible for collecting sales tax on the items they sell. Petitioner was a registered vendor for New York sales tax purposes, and the vehicles in question were sold to purchasers with New York addresses. Hence, petitioner was obligated to collect tax upon its sales of such vehicles unless it could establish that such sales were not subject to tax (Tax Law § 1132[c]). Petitioner does not dispute its obligation to collect, arguing instead that despite its failure to have done so at the time of sale, tax may have been paid thereafter as required upon re-registration of the vehicle(s). In this regard, petitioner points to Tax Law § 1132(f) which provides that DMV will not register an automobile absent proof that sales tax has been paid or

that sales tax is not due, and to Tax Law § 1132(g)(1) which provides that DMV acts as the agent of the Commissioner of Taxation and Finance for purposes of collecting sales tax upon registration. Since proof that tax was paid upon registration of the subject vehicles would have the practical effect of cancelling the assessment, the main issue in this case is whether petitioner has proven that the tax has been paid, or was (and is) not due.

B. Petitioner, as noted, does not deny that it should have collected tax at the time of sale of the vehicles. Petitioner offered some argument that its vendor's obligation to collect was met by affixing a stamped legend on the back of each vehicle transfer document (certificate of title) indicating that no tax was collected on the sale. However, not only is the evidence to support this argument less than clear (see, Finding of Fact "13"), but petitioner has cited no legal authority, nor is any apparent, to support such argument. In addition, petitioner argues that DMV possibly failed in its obligation to collect the tax at the time of registration. Petitioner hones this argument to be that DMV has refused to provide information regarding registration of the vehicles at issue thereby leaving petitioner unable to obtain information as to whether tax has been paid on such vehicles (which payment would, as noted, serve to cancel the assessment herein). Furthermore, petitioner argues that if such DMV information showed that the vehicles had been registered without DMV having collected tax, then DMV would be at fault. In turn, petitioner apparently argues that since DMV is an agent of the Commissioner of Taxation and Finance, any such failure should result in cancellation of the assessment. In this regard, petitioner argues that the notation of no tax collected (as allegedly stamped on vehicle titles) should have served as notice to DMV that tax had not been paid by the purchasers at the time of sale.

C. Petitioner's argument that DMV may have erroneously allowed the registration of one or both of the Schreibers' vehicles without requiring proof of payment of tax or upon accepting fraudulent evidence of payment or exemption is not only speculative, but is insufficient to relieve petitioner of its obligation to collect tax in the first instance (Matter of Mendon Leasing Corp. v. State Tax Commn, 135 AD2d 917, 522 NYS2d 315, lv denied 71 NY2d 805, 529

NYS2d 276). In essence, petitioner's arguments against liability for its initial failure to collect stem from its claimed inability to obtain information regarding subsequent registration of the vehicles with payment of tax. While petitioner claims to have been stymied in its attempts to obtain information from DMV, there is no evidence reflecting follow-up efforts by petitioner, including attempts to enforce the subpoena served on DMV or, even more directly, that petitioner followed DMV advice to proceed in obtaining information from a specific Department of Taxation and Finance source. Furthermore, there is evidence that through the efforts of the BCMS conferee a request was made for information from the Division's Centralized Vehicle Sales Tax Payment File. That information revealed no indication that tax was paid with respect to either of the vehicles in question (see, Finding of Fact "9"). While petitioner notes that this information only became available to petitioner when introduced in evidence at hearing, there was no request for continuance of the hearing to further inquire nor, as noted, did petitioner attempt to obtain such information as directed by the DMV response to petitioner's subpoena. On balance, therefore, it is concluded that not only has petitioner's desire for information from DMV been carried out through the efforts of the conciliation conferee, but that petitioner did not avail itself of the avenues of obtaining information presented to it. Accordingly, the claim that DMV precluded petitioner from obtaining facts essential to the defense of its case is unpersuasive.

D. In simplest terms, petitioner has admitted that tax was not initially collected as was required with respect to its sales of the vehicles. In turn, petitioner has not shown that tax was paid at anytime thereafter (or was not due) with respect to such vehicles. On this score, the evidence submitted reveals that one of the vehicles was registered, without collection of tax, and that no registration information was on file for the other vehicle. While it is possible that the former vehicle was improperly registered by DMV without payment of tax and that the latter vehicle was not subject to tax (e.g., registered in another state), such circumstances do not excuse petitioner's failure to have collected tax at the time of sale or otherwise serve to warrant cancellation of the assessment (Matter of Mendon Leasing Corp. v. State Tax Commn., supra).

E. The petition of Supreme Petroleum Company of New Jersey, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 30, 1990, as reduced per the conciliation order, is sustained.

DATED: Troy, New York
April 28, 1994

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE