

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.	:	DECISION
	:	DTA NOS. 827916
	:	AND 828547
for Revision of Determinations or for Refunds of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the period September 1, 2013 through December 31, 2016.	:	

Petitioner, Watchtower Bible and Tract Society of New York, Inc., filed an exception to the determination of the Administrative Law Judge issued on September 26, 2019. Petitioner appeared by Beth L. Konken, Esq. and John O. Miller, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. No reply brief was filed. Oral argument was not requested. The six-month period for issuance of this decision began on January 21, 2020, the date that petitioner filed a letter stating that no reply brief would be filed.

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

ISSUE

Whether petitioner, a tax exempt religious organization, qualifies for a refund of tax on petroleum businesses paid on non-highway diesel motor fuel used in its off-road equipment while building its world headquarters in Warwick, New York.

FINDINGS OF FACT

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

1. Petitioner, Watchtower Bible and Tract Society of New York, Inc., is a New York not-for-profit corporation exempt from sales and use under Tax Law § 1116 (a) (4). Petitioner's purposes are religious and charitable. Petitioner supports the activities of Jehovah's Witnesses by printing and distributing bibles and other religious literature; supporting bible-based education; supporting a religious order; providing humanitarian assistance in times of disaster; and building and owning facilities where many of those activities are organized, initiated or performed.

2. On September 10, 2015, petitioner filed a claim for refund of tax on petroleum businesses in the amount of \$67,466.13, for the period September 1, 2013 through December 31, 2014. The refund application stated that petitioner used the non-highway diesel motor fuel (dyed diesel) "[f]or off road construction and farming equipment, emergency fuel for generators, and heaters." The refund application included invoices for the dyed diesel that petitioner purchased during this time frame. The Division of Taxation (Division) does not take issue with the amount of tax claimed as a refund.

3. By letter dated September 27, 2015, the Division requested an equipment list of the items used in petitioner's farming and construction operations as well as a statement as to what petitioner does in relation to the refund request.

4. Petitioner responded to the Division's September 27, 2015 inquiry via letter dated October 7, 2015. Petitioner's response included a list of equipment as well as an explanation that the dyed diesel was used in its farming operations and during the construction of petitioner's

world headquarters in Warwick, New York. As to its farming operations, petitioner explained that its farms were located in Wallkill, New York, and provide fruit, vegetables and beef for its volunteer members in New York.

5. On November 12, 2015 the Division sent a refund claim determination notice (first refund denial) denying petitioner's refund request. Thereafter, the Division learned that the dyed diesel used by petitioner was delivered to a fuel truck with a hose and nozzle that was used to fuel petitioner's off-road construction equipment. With that knowledge, the Division issued an addendum to the first refund denial which clarified that the refund claim was denied because the dyed diesel was delivered into a fuel truck equipped with a nozzle.

6. Subsequently, on August 21, 2017, petitioner filed separate applications for refund of tax on petroleum businesses in the amounts of \$64,686.28 and \$10,891.03, for the calendar years 2015 and 2016, respectively (second and third refund requests). The second and third refund requests also included invoices for the dyed diesel that petitioner purchased during this time frame. The Division does not take issue with the amount of tax claimed as a refund.

7. On October 6, 2017, the Division issued separate refund claim determination notices denying the second and third refund requests. These refund denials each state that, because petitioner's purchases of dyed diesel were delivered into a tank equipped with a nozzle that could be used to fuel a motor vehicle, petitioner did not qualify for the exemption.

8. At the hearing in this matter, petitioner presented the testimony of Dirk Johnson, a member of the Jehovah's Witnesses religious order, who oversaw the procurement of construction equipment and motor fuel for petitioner during the construction of petitioner's world headquarters in the Town of Warwick, New York. During his testimony, Mr. Johnson confirmed that none of the fuel that forms the basis of the refund claims was used for farming.

All of the dyed diesel that forms the basis of the refund claims was consumed by petitioner during this construction project.

9. Construction of petitioner's world headquarters began in 2013 and was completed in 2017. The facility was built primarily by members of a religious order who took vows of obedience and poverty and by religious volunteers, none of whom received any compensation for their services. The construction project was viewed by the religious order members and religious volunteers as an act of worship.

10. The construction of petitioner's world headquarters had some unique challenges as it was a small site occupied by many workers and many pieces of equipment, and there was a short schedule to complete the project. At the site, approximately 108 pieces of equipment owned by petitioner were fueled with dyed diesel. Petitioner also leased equipment that was fueled with dyed diesel. Some of this equipment was stationary, such as ground heaters and light towers. Other equipment was mobile, such as utility carts, forklifts, excavators, off-road dump trucks, loaders, bulldozers, backhoes, and cranes.

11. Petitioner accepted delivery of the dyed diesel into fuel tanks. Over the course of the project, the primary tank was a 4,500 gallon tank carried on a 2007 Peterbilt 335 fuel truck. For approximately two weeks while the Peterbilt fuel truck was unavailable, petitioner accepted delivery into a fuel tank carried on an International fuel truck and into a stationary tank located at petitioner's property in Tuxedo, New York. Petitioner owned all of these fuel trucks/tanks. For most of the project, petitioner dispensed the dyed diesel from its fuel tanks into a smaller 600-gallon tank on a fuel and lube truck that could easily navigate the construction site. This fuel and lube truck delivered fuel to the various pieces of equipment on site.

12. Each of the fuel tanks was equipped with a diesel nozzle that was capable of fueling the various pieces of equipment used by petitioner in the construction of its world headquarters. The diesel nozzles were too large to fuel most on-road vehicles such as passenger cars and trucks but could fuel vehicles such as buses and tractor trailers.

13. During construction, petitioner did not permit any of the dyed diesel to be used for on-road vehicles. Petitioner implemented policies, procedures, training initiatives, and security to prevent its nozzles from being used to fuel anything other than off-road equipment. The fuel truck tanks and nozzles could be engaged only with keys, and the keys were kept in a secure location. Only a limited number of authorized persons had access to the keys and were specifically trained to use the fuel only for off-road equipment for the construction project. Security guards patrolled the construction site, and gates at each entrance blocked unauthorized vehicles.

14. On-road vehicles were assigned electronic keys to access on-road fuel in a separate fueling area.

15. Petitioner's world headquarters now house a visitor's center, bible displays and exhibits showing the history of Jehovah's Witnesses, and administrative offices that support the international activities of Jehovah's Witnesses, including the preparation of bible teaching materials and publications and the coordination of disaster relief efforts.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed that Tax Law article 13-A imposes a tax on petroleum businesses that is passed through to the purchaser by the seller and is included as part of the selling price. He noted that the Tax Law provides an exemption for non-highway diesel motor fuel (also known as dyed diesel) sold to not-for-profit organizations, such as petitioner

(*see* Tax Law § 282 [16]). The Administrative Law Judge reviewed the requirements that must be met in order for a not-for-profit organization to qualify for the exemption and found that the controversy in the present matter centers on whether petitioner's acceptance of the dyed diesel into its fuel trucks and a stationary tank each equipped with a hose and nozzle disqualifies petitioner from the exemption. Those fuel trucks were used to fuel the equipment used by petitioner at the construction site for the building of its world headquarters.

The Administrative Law Judge noted petitioner's contention that the definition of motor vehicle included in Tax Law article 12-A should apply and that the exemption should be allowed because there are no fuel nozzles in existence that can fill the fuel tanks of the equipment operated by petitioner and not also fill the fuel tanks of motor vehicles that are propelled on state highways.

The Administrative Law Judge rejected petitioner's assertions and determined that the dyed diesel was delivered into a stationary tank and fuel trucks that were equipped with nozzles, which were then used to dispense fuel into the tanks of petitioner's construction equipment. The Administrative Law Judge found that the fuel trucks were capable of fueling motor vehicles regardless of whether petitioner permitted such fueling. He determined that the exemption statute does not look to whether the exempt organization permits dyed diesel to be dispensed into motor vehicles, but whether the repository where the dyed diesel is delivered can fuel a motor vehicle. As to petitioner's contention that such interpretation renders the exemption impossible, the Administrative Law Judge noted that petitioner would qualify for the exemption if a supplier directly fueled petitioner's construction equipment rather than fueling the intermediary repositories. He concluded that the Division had properly denied petitioner's refund claims.

ARGUMENTS ON EXCEPTION

Petitioner contends that it has established the facts to conclude that it met all the elements necessary to qualify for the exemption in Tax Law § 301-b (h). Petitioner first argues that the Administrative Law Judge incorrectly determined, without explanation, that the definition of motor vehicle in Tax Law § 282 does not apply and that he failed to provide an alternative definition of motor vehicle.

Next, petitioner argues that an acceptable dictionary definition of the word “can” is to “have permission to” or “to be permitted” and that, through its training, controls and security measures, petitioner did not permit dyed diesel to be dispensed into motor vehicles. Petitioner contends that if the word “can” is interpreted to mean physically capable, then the exemption statute and definition of motor vehicle combine to create an impossibility in that there are no known nozzles designed to fuel building machinery, power shovels, tractor cranes and not, at least, some other motor vehicles that are propelled on state highways. It argues that the Administrative Law Judge’s interpretation of the statute set an impossible bar for petitioner to reach as a matter of fact and that an exemption for which it is impossible to qualify is unreasonable as a matter of law.

Petitioner also contends that the Administrative Law Judge’s finding that it was possible for a supplier to directly fuel petitioner’s construction equipment is incorrect. Petitioner contends that it tried and was unable to obtain a delivery service to fuel its equipment directly. Even had a fuel delivery service been available, petitioner argues that the Administrative Law Judge’s interpretation undermines the purpose of the exemption, as the handling and delivery fees for a fuel service to fuel its equipment directly could equal or exceed the amount of tax exemption.

Petitioner contends that under its interpretation, it qualifies for the exemption if either the repository itself or strict controls prevented nozzles from being used to fuel vehicles other than those excluded from the definition of motor vehicle. This construction, it argues, gives effect to all of the words in the statute – both the limitation about hoses and other apparatuses and the definition of motor vehicle.

The Division asserts that the Administrative Law Judge's conclusions were correct and that petitioner's exception does not warrant modification of the determination. The Division contends that petitioner has the burden to establish unambiguous entitlement to the claimed exemption and that its interpretation of the statute must be not only plausible, but the only reasonable construction.

The Division points out that petitioner accepted deliveries of non-highway diesel motor fuel into fuel tanks equipped with a nozzle capable of fueling motor vehicles. The Division contends that the Administrative Law Judge properly determined that there was no need to look beyond the words of the statute. It argues that the exemption does not apply when non-highway diesel motor fuel is delivered to a filling station or into a repository that is equipped with a hose or other apparatus by which the non-highway diesel motor fuel can be dispensed into the fuel tank of a motor vehicle, regardless of whether petitioner put safeguards in place to prohibit the fueling of non-exempt motor vehicles.

The Division contends that the assertion that it was impossible for petitioner to qualify for the exemption is not supported by the record. It argues that it was petitioner's business decision to discontinue the fuel deliveries from being dispensed directly into petitioner's construction equipment in favor of having the fuel delivered into its own tanks that were equipped with nozzles. Based on the plain wording of the statute, the Division asserts that its

denial of petitioner's refund claims is not only reasonable but is mandated by the statute.

OPINION

For the reasons stated below, we affirm the determination of the Administrative Law Judge.

Tax Law article 13-A imposes tax on petroleum businesses “for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state . . .” (Tax Law § 301-a [a]). Pursuant to Tax Law § 315 (a), the provisions of article 12-A are incorporated into article 13-A and shall apply to the administration of the petroleum business tax provisions of Tax Law article 13-A, except to the extent that a provision of article 12-A is either inconsistent with, or not relevant to, a provision of article 13-A (*see also Matter of RAD Energy Corp.*, Tax Appeals Tribunal, December 30, 2004). Tax Law § 285-b provides for a presumption that all diesel motor fuel sold, received or possessed in the state is subject to the taxes imposed until the contrary is established (*see* Tax Law § 285-b [2]).

Tax Law § 301-b (h) provides an exemption for non-highway diesel motor fuel sold to not- for-profit organizations as follows:

“Exemption for certain not-for-profit organizations. There shall be exempt from the measure of the petroleum business tax imposed by section three hundred one-a of this article a sale or use of residual petroleum product, or non-highway diesel motor fuel to or by an organization which has qualified under paragraph four or five of subdivision (a) of section eleven hundred sixteen of this chapter where such non-highway diesel motor fuel or residual petroleum product is exclusively for use and consumption by such organization, but only if all of such non-highway diesel motor fuel or product is consumed other than on the public highways of this state. *Provided, however, this exemption shall in no event apply to a sale of non-highway diesel motor fuel which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which such non-highway Diesel motor fuel can be dispensed into the fuel tank of a motor vehicle* and all deliveries hereunder shall be made to the premises occupied by the qualifying organization and used by such organization in furtherance of the exempt purposes of such organization. *Provided,*

however, that the commissioner shall require such documentary proof to qualify for any exemption provided herein as the commissioner deems appropriate. Provided, further, the distributor selling such non-highway Diesel motor fuel and product shall separately report on its return the gallonage sold during the reporting period exempt from tax under the provisions of this subdivision and provide such other information with respect to such sales as the commissioner deems appropriate to prevent evasion Tax Law § 301-b (h)” (emphasis added).

In this case, petitioner is a New York not-for-profit corporation exempt from sales and use taxes under Tax Law § 1116 (a) (4) (*see* finding of fact 1). The dyed diesel fuel that forms the basis of the instant refund claims was consumed by petitioner during the construction of its world headquarters in the Town of Warwick, New York (*see* finding of fact 8). At the site, approximately 108 pieces of equipment owned by petitioner were fueled with the dyed diesel. Petitioner also leased other equipment that was fueled with the dyed diesel. The equipment list provided to the Division includes stationary equipment, such as ground heaters and light towers. Other equipment was mobile, including, utility carts, forklifts, excavators, off-road dump trucks, loaders, bulldozers, backhoes and cranes (*see* finding of fact 10). Petitioner accepted delivery of the dyed diesel into fuel tanks each equipped with a hose and nozzle that were used to fuel its equipment (*see* findings of fact 11 and 12).

It is well settled that statutes creating tax exemptions must be construed against the taxpayer and the taxpayer bears the burden of establishing that the requested exemption applies. “To that end, it is not sufficient for the taxpayer to establish that its construction of the underlying statute is plausible; rather, the taxpayer must demonstrate that ‘its interpretation of the statute is the only reasonable construction’” (*Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.*, 85 AD3d 1341, 1342 [3d Dept 2011], *affd* 19 NY3d 1058 [2012], *rearg denied* 20 NY3d 1024 [2013], *cert denied* 571 US 952 [2013] [internal quotation marks and citations omitted]). The interpretation, however, should not be so narrow and literal as to defeat

the purpose of the exemption (*Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]).

As discussed by the Administrative Law Judge, under the plain wording of the statute, dyed diesel sold to or used by organizations that are exempt from sales and use taxes is exempt from the petroleum business tax if: (i) it is delivered to the premises occupied by the qualifying organization; (ii) the fuel is exclusively for use and consumption in furtherance of its exempt activities; and (iii) the fuel is consumed other than on state highways (Tax Law § 301-b [h]). If, however, the dyed diesel is delivered to a filling station or into a repository that is equipped with a hose or other apparatus by which the dyed diesel can be dispensed into the fuel tank of a motor vehicle, the exemption does not apply (*id.*). In this case, the first three requirements are not in dispute; rather, the controversy centers on whether petitioner's acceptance of the dyed diesel into its fuel trucks and stationary tank each equipped with a hose and nozzle that could be used to dispense fuel into a motor vehicle disqualifies it from receiving the exemption under Tax Law § 301-b (h).

Petitioner does not dispute that the nozzles on its fuel tanks were physically capable of dispensing the dyed diesel into the fuel tanks of some non-exempt motor vehicles. It argues, however, that its construction equipment is excepted from the definition of motor vehicle in Tax Law § 282 (3). It further argues that the word "can" in the highlighted portion of Tax Law § 301-b (h) above, which is not defined in the Tax Law, should be interpreted to mean to "have permission to" or "to be permitted." Petitioner contends that the Administrative Law Judge applied the word "can" solely to physical capability. Petitioner argues that its policies and procedures, training program, strict controls on access to the fuel tanks, and security all lead to a conclusion that it did not permit the fueling of motor vehicles from its tanks and, thus, the

exemption should apply.

Petitioner further contends that its interpretation is the only construction that produces a reasonable result by harmonizing the exemption statute with the definition of motor vehicle in Tax Law § 282 (3). It argues that there are no nozzles designed to fuel the large construction vehicles excluded from the definition of motor vehicle that are not also capable of fueling other motor vehicles that are propelled on state highways, particularly tractor trailers and buses. It contends that the Administrative Law Judge's determination creates a situation where it is impossible for petitioner to qualify for the exemption.

We find that petitioner has failed to prove that its interpretation of Tax Law § 301-b (h) is the only reasonable construction of that statute. To properly interpret the relevant language, we are guided by the fundamental rule of statutory construction, which is to effectuate the intent of the legislature (*Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.*, 83 NY2d 240, 244 [1994] *cert denied* 513 US 811 [1994]). “[W]hen the language of a tax statute is unambiguous, it should be construed so as to give effect to the plain meaning of the words used (citation omitted)” (*New York State Assn. of Counties v Axelrod*, 213 AD2d 18, 24 [3d Dept 1995], *lv dismissed* 87 NY2d 918 [1996]). Every word must, if possible, be given meaning (*Sanders v Winship*, 57 NY2d 391, 396 [1982]). This is because “[t]he statutory text is the clearest indicator of legislative intent” (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]).

Here, the intent of the Legislature is clear from the statutory language used. The exemption for the purchase of non-highway diesel motor fuel does not apply to fuel that is “delivered into a repository that is equipped with a hose or other apparatus by which the [dyed diesel] can be dispensed into the fuel tank of a motor vehicle” (Tax Law § 301-b [h]). We find

that the Administrative Law Judge's construction of "can" as used in the statute to mean "capable of" was reasonable. Accordingly, we agree with the Administrative Law Judge that petitioner's fuel trucks were capable of fueling motor vehicles, regardless of petitioner's policies and procedures. Indeed, petitioner's witness testified at the hearing that it was not possible for him to say for certain that the dyed diesel that was delivered to petitioner's fuel trucks and stationary tank was used only for exempt purposes. Given this testimony and our interpretation of the exemption statute, petitioner's contention that the motorized vehicles on its construction site were exempt from the definition of motor vehicle in Tax Law § 282 (3) is irrelevant. We also find that petitioner has failed to establish that the Administrative Law Judge's interpretation of Tax Law § 301-b (h) makes it impossible for it to avail itself of the exemption. As discussed in the determination, petitioner would qualify for the exemption if a supplier directly fueled petitioner's construction equipment rather than petitioner accepting delivery into intermediary repositories and then fueling the equipment itself. At the hearing, petitioner's witness asserted in a conclusory manner that its construction equipment could not be fueled directly by a supplier. He testified that a supplier tried to fuel its equipment but failed because it couldn't find the equipment and couldn't come as often as petitioner needed. Although the testimony indicates that there were problems with the direct fueling, petitioner failed to establish that it thoroughly exhausted all options to have a supplier fuel its motorized vehicles directly and certainly did not establish that it was impossible. Petitioner also argues that having a supplier fuel its equipment directly would cost more than the exemption would save, but it provided no evidence to substantiate that claim.

Ultimately, proper statutory construction focuses on "the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with

the discernable intention and expression of the Legislature [citation omitted]” (*Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.* 83 NY2d at 244, 245). Here, we find that the Division’s construction of the relevant statutes meets that standard and should be upheld (*see Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.* 14 AD3d 553, 556 [2d Dept 2005], *affd* 7 NY3d 451 [2006], *quoting Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Watchtower Bible and Tract Society of New York, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Watchtower Bible and Tract Society of New York, Inc. are denied;

and

4. The refund claim determination notices dated November 12, 2015 and October 6, 2017, are sustained.

DATED: Albany, New York
July 16, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner