STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RILUC CO., INC.	:	DECISION
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period February 1983 through December 1983.	:	
	:	

Petitioner, Riluc Co., Inc., 30 North Pollard Drive, Fulton, New York 13069, filed an exception to the determination of the Administrative Law Judge issued on July 8, 1988 with respect to its petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period February 1983 through December 1983 (File No. 802892). Petitioner appeared by Lane, Johnstone, Sheldon & Neild, P.C. (William J. Neild, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

The petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition to the exception. Oral argument was not requested by either party.

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

ISSUES

I. Whether the Division properly concluded that petitioner failed to pay tax on its purchases from a particular fuel distributor because the sales invoices from that distributor did not separately state the amount of tax paid.

II. Whether the assessment of fuel use tax herein constitutes selective prosecution.

FINDINGS OF FACT

We find the facts as stated by the Administrative Law Judge and such facts are incorporated herein by this reference, except that we modify Finding of Fact "6" as indicated below.

To summarize the facts, found by the Administrative Law Judge, during the period in issue petitioner, Riluc Co., Inc., operated six diesel trucks, one diesel tractor and one trailer which were used to haul items such as stone, gravel and blacktop. Petitioner filed combined truck mileage and fuel use tax returns during the audit period. On these returns, petitionerdeclined to complete the fuel use tax section, presumably on the basis that petitioner purchased and used its fuel in New York State and was, therefore, seemingly entitled to a fuel use tax credit.

In the course of a field audit of petitioner's records, the Division found that one of the petitioner's suppliers of motor fuel, O. R. Hill Fuel ("Hill"), was an unregistered vendor. The Division concluded that petitioner was unable to substantiate that it had paid motor fuel and sales taxes on its purchases of diesel fuel from Hill during the period in issue. As a result, the Division issued an assessment of motor fuel tax under Article 12-A of the Tax Law. Subsequently, the Division concluded that the tax should have been assessed pursuant to Article 21 of the Tax Law (which imposes tax on carriers) and, as a result, it cancelled the assessment under Article 12-A of the Tax Law.

On October 18, 1985, the Division issued an Assessment of Unpaid Fuel Use Tax to petitioner whereby the Division assessed a deficiency of fuel use tax in the amount of $11,910.17, plus penalty of $595.51 and interest of $3,049.96, for a total of $15,555.64. As was the case with the prior assessment, the basis for this assessment was the Division's position that petitioner was unable to substantiate that taxes were paid on its purchases of diesel motor fuel from Hill. Consequently, the Division disallowed the credit for taxes paid on fuel purchases made in New York.

During the period in issue, petitioner maintained an arrangement with Hill whereby at either the beginning or end of the day Hill would send a fuel truck to petitioner's garage and furnish petitioner's trucks with fuel. Hill's practice was to leave a slip of paper stating the number of gallons provided at the time of the delivery. On a monthly basis, Hill sent petitioner a bill for the gasoline delivered.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> The monthly bill from Hill reflected the date of delivery, the number of gallons delivered, the amount charged for the delivery that particular day and Hill's and petitioner's name and address. The invoice concluded with the phrase, "All purchases include all taxes". The only such invoice produced by petitioner at the hearing was an invoice for the month of May 1983.

The price petitioner paid for fuel was approximately the same as that which petitioner would have paid at service stations. However, it was advantageous for petitioner to have the fuel delivered since it avoided the expense of paying an individual to take a truck to a fuel station.

It was petitioner's impression that taxes were being paid at the time funds were remitted to Hill. Petitioner first learned that Hill was not a registered vendor in the course of the audit. Upon learning that Hill was not a registered vendor, petitioner ceased making purchases from Hill.

Petitioner is not aware of any vendor whose invoices contain a breakdown of the taxes paid. Most suppliers known to petitioner issue a receipt which states that all taxes are included. Finally, petitioner cooperated with the audit of its business activities.

OPINION

The Administrative Law Judge held that for the audit period: (1) the Division of Taxation was entitled to conclude that neither motor fuel nor sales tax had been paid by petitioner on its purchases from an unregistered motor fuel vendor ("vendor"), where petitioner's invoices from said vendor failed to separately state these taxes, (2) that Tax Law section 289-c(1) is inapplicable herein since the vendor was unregistered, (3) petitioner was a "distributor" of diesel fuel, within the meaning of Article 12-A of the Tax Law, subject to the reporting requirements of

20 NYCRR 420.9, (4) petitioner's assessment is based upon petitioner's own failure to properly maintain its invoice records and not upon selective prosecution by the State, (5) regulation 20 NYCRR 493.3(b) was applicable herein for an assessment under Article 21 of the Tax Law, (6) regulations 20 NYCRR 420.9 and 20 NYCRR 493.3(b) are not unconstitutionally vague, and that (7) cancellation of the penalties and interest in excess of the minimum was warranted.

On exception, petitioner asserts that: (1) the record keeping requirements of 20 NYCRR 493.3(b) are not applicable to a claim for a credit under Tax Law section 503-a(3), (2) invoices from the vendor stating, "All taxes included," substantially comply with the requirements of Tax Law section 1132(a), 20 NYCRR 532.1(b)(1), and 20 NYCRR 493.3(b), (3) substantial compliance therewith entitled it, under Tax Law section 289-c(1), to be deemed to have paid the taxes and, under Tax Law section 503-a(3), to then receive credit for those alleged payments, and (4) the statutes and regulations in question violate minimum standards of due process. In response, the Division relies upon the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

A fuel use tax, in addition to the highway use tax imposed by Tax Law section 503, is imposed on carriers, and jointly and severally on the vehicle's owner where the carrier does not own the vehicle, for the privilege of operating certain motor vehicles on New York's public highways (Tax Law § 503-a). The fuel use tax is based upon calculations using fuel tax and sales tax components. The fuel tax component is equal to the rate per gallon imposed under Tax Law Article 12-A for motor and diesel fuel. The sales tax component represents the state and highest local sales tax rate per gallon for motor and diesel fuel but in no event may this rate exceed 7 percent (Tax Law § 503-a[2]).

A credit against the fuel use tax is available if several conditions are met (Tax Law § 503-a[3]). This credit is figured by again adding two components. The first is the amount of tax already paid under Article 12-A on the carrier's fuel purchases in New York for use anywhere in its operations. The other is based on the sales tax component described above, but is only available where the carrier has paid the applicable New York sales tax on each gallon of fuel for

which it seeks the credit and where the fuel was used within New York. The net effect of this complex arrangement is twofold. Those who have paid motor fuel and sales taxes on the motor fuel they purchased in New York under Articles 12-A and 28 may not have to pay the fuel use tax under Article 21. However, those carriers who purchased fuel outside of New York and then used it within New York do face fuel use tax liability under Article 21. Since no tax under Articles 12-A and 28 is paid on these out-of-state purchases, no credit against the Article 21 tax is later available for them. Here, petitioner's use of diesel fuel in its trucks to haul material within New York subjects it to fuel use tax under Article 21. The remaining question is whether petitioner is entitled to the credit against this tax. For the reasons which follow, we conclude that petitioner is not entitled to this credit.

We first address whether the record keeping requirements of 20 NYCRR 493.3(b) are applicable to the fuel use tax provisions of Tax Law section 503-a(3) even though the regulations were promulgated pursuant to Tax Law section 507. We conclude they are.

Tax Law section 507 states in relevant part, "Every carrier subject to this article and every carrier to whom a permit was issued shall keep a complete and accurate daily record which shall show the miles traveled in this state by each vehicular unit and such other information as the tax commission may require" (emphasis supplied). "Such other information" is, in part, "the fuel used by (a carrier's) vehicle and the fuel purchased by such carrier" (20 NYCRR 493.1[a]), as evidenced by properly completed fuel purchase invoices (20 NYCRR 493.3[b]). That this information is also required for the fuel use tax imposed under Tax Law section 503-a is clear, since "the rest of the provisions of this article (Article 21) shall be applicable to the tax imposed by this section (Tax Law §503-a) except to the extent such provisions are inconsistent with a provision in this section" (Tax Law §503-a[10]). We find no inconsistency between Tax Law sections 503-a and 507. Instead, since the burden is on petitioner to demonstrate that it qualifies for a credit against tax, the two sections are entirely in harmony with each other.

We next address whether petitioner has demonstrated that it has paid the applicable taxes under Articles 12-A and 28. We conclude that it has not done so, as was its burden (20 NYCRR 3000.10[d][4]).

A carrier can prove that it has paid the applicable taxes due on its fuel purchases by providing invoices which show, inter alia, the "Federal, State and local excise and sales tax charged" (20 NYCRR 493.3[b]). Petitioner asserts that it substantially complied with Tax Law section 1132(a), 20 NYCRR 532.1(b)(1) and 20 NYCRR 493.3(b) ("the regulation") and has, therefore, fulfilled its reporting requirements. We disagree. While "substantial compliance" is admittedly no stranger to the Tax Law (see, Matter of Agosto v. State Tax Commn., 68 NY2d 891, 893; Matter of Gun Hill Plumbing Supply Company, Inc. v. Chu, 145 AD2d __ (535 NYS2d 497); Matter of Yiouti Restaurant, Inc. v. State Tax Commn., 135 AD2d 973, 974; Sussman v. Hendrickson, 123 Misc 2d 949, 953; Matter of Castine v. State Tax Commn., 112 Misc 2d 322, 325), we know of no support for the proposition that it applies generally to records required by the Commissioner of Taxation and Finance or to those records required, in particular, under Articles 12-A, 21, or 28.

In any event, petitioner has not "substantially complied" with its record keeping obligations. Petitioner provided but one invoice for the audit period which, in turn, pertained only to May, 1983. That sample invoice satisfies only four[1] of the regulation's 13 invoice requirements. None of these four requirements pertains to excise or sales taxes. Neither has petitioner at all, contrary to its assertions, complied with the sales tax requirement that an invoice separately state whether sales tax has been paid (20 NYCRR 532.1[b][1]). Petitioner's invoices simply state, "All purchases include all taxes." We note that "[t]he words 'tax included' (emphasis in original) or words of similar import, on a sales slip or other document, do not constitute a separate statement of the tax" (20 NYCRR 532.1[b][3]). The statement within petitioner's sample invoice that "All purchases include all taxes" amounts to nothing more than

[1]These are the "name and address of the vendor," "name and address of the purchasers," "number of gallons," and "date of sale."

"words of similar import" to the phrase "tax included" and, as such, cannot be said to separately state the sales tax due (20 NYCRR 532.1[b][3]).

Petitioner's reliance upon Tax Law section 289-c(1), as pointed out by the Administrative Law Judge, is misplaced. This section provides that when a fuel distributor pays tax on motor fuel, the payment is deemed to have been made on account of the purchaser. Here, petitioner has not begun to demonstrate that its unregistered distributor paid any tax under Articles 12-A or 28. Thus, petitioner's failure to present adequate invoices or proof of its distributor's payment of taxes on its behalf bars petitioner from claiming the credit against fuel use tax allowable under Tax Law section 503-a.

We next address petitioner's allegation that Tax Law section 503-a(3) and 20 NYCRR 493.3(b) are unconstitutional as applied against it. Specifically, petitioner alleges that the Division has breached petitioner's rights to procedural due process by selectively enforcing the regulation and by placing petitioner at the mercy of its distributor with no way of protecting itself from having to pay tax twice. The issue is within our jurisdiction (20 NYCRR 3000.11[e][3]; see also, Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988; Matter of J.C. Penney, Inc., Tax Appeals Tribunal, April 27, 1989). As to petitioner's allegation that the Division never enforces the invoice keeping requirements for motor fuel purchases provided by the regulation, we note that the Division of Taxation "is not put to the choice of taxing either all sales or none" (Matter of Seafarer Fiber Glass Yachts, Inc., 475 F Supp. 1097 [E.D.N.Y., 1979], see also, Matter of Savemart, Inc. v. State Tax Commn., 105 AD2d 1001, 1004; appeal dismissed, 64 NY2d 1039; Matter of J.C. Penney Inc., Tax Appeals Tribunal, April 27, 1989). Furthermore, even aside from that rule, the record contains no evidence that petitioner was singled out for treatment different from that accorded other taxpayers similarly situated.

Finally, we dismiss petitioner's remaining points. Petitioner was not at the mercy of its distributor with respect to the form of the invoices petitioner received on its purchases. Petitioner was free to negotiate with its distributor to insure that such invoices and receipts

complied with the applicable regulations. Also, petitioner could have telephoned the Department of Taxation to inquire as to whether its distributor was registered.[2]

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Riluc Co., Inc., is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Riluc Co., Inc., is granted to the extent of conclusions of law "H" and "I" of the Adminstrative Law Judge's determination but, except as so granted, the petition is in all other respects denied and the Assessment of Unpaid Fuel Use Tax, dated October 18, 1985, is sustained.

DATED: Troy, New York
April 27, 1989

/s/ John P. Dugan
John P. Dugan
President

/s/ Francis R. Koenig
Francis R. Koenig
Commissioner

[2]Motor fuel purchasers, in fact, may make such requests by telephoning the Division of Taxation at (518) 457-8573 or (518) 457-1644.