

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
M.W.S. ENTERPRISES, INC.	:	DECISION
	:	DTA No. 804307
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 February 1, 1983	:	
through June 30, 1985.	:	

Petitioner M.W.S. Enterprises, Inc., 5701 Transit Road, East Amherst, New York 14051 filed an exception to the determination of the Administrative Law Judge issued on April 11, 1991 with respect to its 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 February 1, 1983 through June 30, 1985. Petitioner appeared by Smith, Speranza, Pusateri, Tilney, Fitzgerald, Foltz & May, Esqs. (Leonard G. Tilney, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah Dwyer, Esq., of counsel).

Both parties filed briefs on exception.

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

ISSUES

I. Whether Chapter 44 of the Laws of 1985 authorizes a refund of sales tax paid on the purchase of motor fuel by a service station operator from a distributor during the period February 1, 1983 through June 30, 1985, to the extent that such tax exceeds the amount that would be due if the tax were calculated based on the price at which the service station sold the motor fuel.

II. Whether Chapters 454 and 469 of the Laws of 1982 violate the equal protection provisions of the State and Federal constitutions.

III. Whether Chapters 454 and 469 of the Laws of 1982 permit an unjust taking of property without just compensation in violation of the due process and eminent domain provisions of the State and Federal constitutions.

FINDINGS OF FACT

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

Petitioner, M.W.S. Enterprises, Inc., and the Division of Taxation ("Division") entered into a stipulation of facts which has been substantially incorporated into this determination.

Petitioner operates a retail convenience store and gasoline service station called Arco AM-PM Minimart located at 680 Center Street, Lewiston, New York. Petitioner's supplier is Atlantic Richfield Tonawanda Terminal. During the period February 1, 1983 through June 30, 1985, petitioner paid sales tax on its purchases of gasoline from its supplier based on the regional (region 9) average sales price for gasoline. Petitioner then sold the gasoline to its retail customers at a price lower than the regional average retail sales price.

On or about March 10, 1986, petitioner filed an application for credit or refund of state and local sales taxes on gasoline in the amount of \$13,564.01. Petitioner's claim was premised on the assertion that tax payments to its gasoline supplier exceeded the tax that would be due if computed on petitioner's actual retail sales prices to its customers.¹

By a letter dated April 15, 1986, the Division denied petitioner's application for refund, taking the position that the Tax Law does not provide for a refund under the circumstances presented here.

¹Petitioner's refund application included the period June 1, 1985 through June 30, 1985. A schedule attached to the application shows that sales tax collected by petitioner on the retail selling price of gasoline exceeded sales tax prepaid to its supplier in that period.

A conciliation conference was held on June 2, 1987. Based on information provided by petitioner, the Division verified that petitioner accurately calculated the amount of the refund due if it prevails on the legal issues.

OPINION

The Administrative Law Judge, relying on Matter of Fourth Day Enters. (Tax Appeals Tribunal, October 27, 1988), determined that petitioner was not entitled to a refund. Specifically, the Administrative Law Judge determined that the effective date sections of Chapter 44 of the Laws of 1985, relied on by petitioner in its assertion that it is entitled to a refund, were not remedial in nature and did not provide authority for the refund sought by petitioner.

Further, the Administrative Law Judge determined that the Division was without authority to deal with petitioner's challenges to the constitutionality of Chapters 454 and 469 of the Laws of 1982, as enacted.

On exception, petitioner reiterates its assertions at hearing that it is entitled to a refund and that Chapters 454 and 469 of the Laws of 1982 are unconstitutional as enacted.

The Division relies upon the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge based upon our decision in Matter of Fourth Day Enters. (*supra*).

Prior to September 1, 1982, sales tax on motor fuel was imposed and required to be collected on each gallon of gasoline sold at retail service stations (former Tax Law § 1111[d]). The tax was imposed at the combined State (4%) and the applicable local rate (if any) and was applied to the actual selling price of the motor fuel. Each individual service station was required to collect and remit the tax.

Beginning September 1, 1982 (L 1982, chs 454 and 469) and during the period at issue here, February 28, 1983 through June 1, 1985, the sales tax on motor fuel was collected on sales by distributors to non-distributors, such as retail service stations. The 1982 legislation accomplished this shift in the imposition of the tax by redefining the term "retail sale," the operable term which triggers the tax, to mean the sale of motor fuel by a distributor (former Tax

Law § 1101[b][4][ii]). The effect of the change was to place imposition of the tax at a higher place in the distribution chain than the retail service station.

The rate of tax applicable to such sales was the same as under prior law but the price to which it applied was changed from the actual selling price to the "statewide average retail markup" (former Tax Law § 1111[e][1] as amended by L 1982, ch 454) and eventually to the "regional average retail sales price" (former Tax Law § 1111[e][1] as amended by L 1982, ch 930). In either event, the tax collected by the distributor was included in the cost to the service station and passed through to the ultimate consumer (former Tax Law § 1111[e][4]). The price on the pump was to include the tax so paid (former Tax Law § 1111[d]).

Notably, under the law in effect during this period, no refund or credit was provided to a service station based upon any difference between the markup prices against which the tax rate was applied and the actual selling price by the service station owner. If the actual sales price was higher than the "regional average retail sales price," the retail service station owner was not liable for additional tax due. Conversely, if the actual sales price was lower than the "regional average retail sales price," no refund was due. The concept was that the amount of the tax was fixed, paid over and passed on to the customer irrespective of the actual selling price. In short, under this system, the retail sale which triggered the imposition of the tax had occurred for sales tax purposes when the motor fuel was sold by the distributor.

Chapter 44 of the Laws of 1985, generally effective June 1, 1985, introduced a new system, i.e., a prepaid sales tax, which made the actual sales price and the rate of taxation applicable in a retailer's locale the controlling factors.²

²As added by Chapter 44 of the Laws of 1985, Tax Law § 1102(a) provided:

"Every distributor shall prepay, on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, a tax on each gallon of motor fuel (i) which he imports or causes to be imported into this state for use, distribution, storage or sale in the state or produces, refines, manufactures or compounds in this state or (ii) if the tax has not been imposed prior to its sale in this state, which he sells . . ." (emphasis added).

Chapter 44 divided the State into two regions for purposes of the imposition of the tax: a downstate region consisting of the Metropolitan Commuter Transportation District and an upstate region consisting of the remainder of the State (see, Tax Law § 1111[e][1], as added by L 1985, ch 44, § 22). The prepaid tax was imposed at the rate of 7% upon the regional average retail sales price established by the Energy Commissioner for the downstate region and at the rate of 6% upon the regional average retail sales price established by such Commissioner for the upstate region (Tax Law § 1111[e][2], as by amended L 1985, ch 44, § 22).

Section 18 of Chapter 44 of the Laws of 1985 amended section 1101(b)(4)(ii) to delete the special definition of "retail sale" that had deemed the sale of automotive fuel by a distributor to be a retail sale. Accordingly, on and after June 1, 1985, service stations were required to collect the tax imposed by section 1105 upon their sales of motor fuel to consumers based upon the combined State and local sales tax rate in effect in the particular locality and the actual sales price.

Tax Law § 1101(b)(4)(ii), as amended by Chapter 44 of the Laws of 1985, provided that the prepaid tax was to be passed through on purchases as follows:

" . . . no motor fuel shall be sold in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid"

Pursuant to Tax Law § 1120(a)(1), as added by section 26 of Chapter 44 of the Laws of 1985, a service station was allowed a refund or credit for the prepaid sales tax thus included in its cost against the retail sales tax which it was required to collect, on and after June 1, 1985.³

³Tax Law § 1120(a)(1), as added by L 1985, ch 44 § 26 provided:

"A vendor of motor fuel who or which is required to collect the taxes imposed by subdivision (a) of section eleven hundred five of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter shall be allowed a refund or credit against the amount of tax collected and required to be remitted to the tax commission pursuant to the provision of section eleven hundred thirty-seven of this article upon the retail sale of motor fuel in the amount of the tax on such motor fuel prepaid by or passed through to and included in the price paid by such vendor pursuant to the provisions of section eleven hundred two of this article" (emphasis added).

Section 42 of Chapter 44 of the Laws of 1985 stated the effective date of the act and addressed the transition from the old system to the new system of tax collection. The Legislature recognized that vendors would have in their inventory on June 1, 1985 motor fuel upon which the tax would have been paid under the former system of tax collection and upon which the tax would be imposed under section 1105 of the Tax Law upon a sale to a consumer. Section 42 prevented the tax from being imposed more than once with respect to such motor fuel.

The language, read in conjunction with Tax Law § 1120(a)(1), allowed a refund or a credit of the tax paid under the former system of taxation against the tax which, under the new system, the service station owner is now required to collect and remit upon his sale (Tax Law § 1105).⁴ Otherwise, the motor fuel would be taxed twice: first, on the sale by the distributor based upon the special definition of "retail sale" applicable from September 1, 1982 through May 31, 1985, and, second, upon the sale by the service station which after June 1, 1985 constitutes a retail sale of motor fuel (Tax Law § 1101[b][4]).

Statutes should be read in context and all parts of an act should be construed together (McKinney's Cons Laws of NY, Book 1, Statutes § 97). Chapter 44 of the Laws of 1985 changed

⁴L 1985, ch 44 § 42 provided:

"This act shall take effect immediately, except that sections one through thirty-six shall take effect June first, nineteen hundred eighty-five and shall apply to all taxable events respecting motor fuel as such events are defined in section eleven hundred two of the tax law, as amended by this act, and automotive fuel occurring on and after such date and an amount equivalent to the sales taxes paid by or passed through to a purchaser upon sales of motor fuel before such date at the regional average retail sales price pursuant to the provisions of articles twenty-eight and twenty-nine of the tax law in effect prior to such date shall be allowed such purchaser as a credit or refund, where a refund or credit would be allowable after such date under the tax law, as amended by this act, against the tax required to be prepaid pursuant to section eleven hundred two and passed through or required to be collected or paid pursuant to section eleven hundred five or eleven hundred ten of the tax law upon sales or uses of such motor fuel occurring on and after such date and provided further, however, that no refund or credit shall be allowed pursuant to this provision with respect to motor fuel placed into the ordinary fuel tank connected with the engine of such vehicle prior to such date notwithstanding use of such fuel thereafter" (emphasis added).

the system of sales tax collection with respect to motor fuel to address evasion in the previous system (Memorandum of Senator Lack, NY Legis Ann, 1985, pp. 55-57). Statutes should not be construed retroactively in the absence of a clear expression of legislative purpose (see, McKinney's Cons Laws of NY, Book 1, Statutes § 51, p. 89). Here, there is no expression of legislative intent that the provisions of section 42 regarding refunds and credits apply retroactively. When read in context, those provisions tucked away in the effective date clause clearly relate to the transition from the former system of tax collection to the new system as described above.

We deal next with petitioner's assertion that Chapters 454 and 469 of the Laws of 1982 are unconstitutional and, therefore, deny petitioner its constitutional right to equal protection under the law. The jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass such constitutional challenges. It is presumed at this level of review that statutes are constitutional and that Chapters 454 and 469 of the Laws of 1982 in particular are constitutional (see, Matter of Phelps, Tax Appeals Tribunal, November 2, 1989; Matter of Wizard Corp., Tax Appeals Tribunal, January 12, 1989; Matter of Fourth Day Enters., supra; Matter of Jones, State Tax Commn., June 29, 1983; see also, Matter of Tampa Mktg. Corp., State Tax Commn., February 13, 1980).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of M.W.S. Enterprises, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of M.W.S. Enterprises, Inc. is denied; and

4. The Division of Taxation's denial of the refund claim is sustained.

DATED: Troy, New York
November 21, 1991

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner