STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
USAIR, INC.	:	DECISION DTA No. 806206
for Revision of a Determination or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period April 1, 1984 through December 31, 1985.	:	
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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 25, 1990 with respect to the petition of USAir, Inc., Washington National Airport, Washington, DC 20001 for revision of a determination or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the period April 1, 1984 through December 31, 1985. Petitioner appeared by Hiscock and Barclay, Esqs. (E. Parker Brown, II, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both parties filed briefs on exception. Oral argument, at the Division of Taxation's request, was heard on July 18, 1991.

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

ISSUE

Whether the Division properly denied petitioner's January 20, 1987 applications for refund of tax on petroleum businesses for the period April 1, 1984 through December 31, 1984 and January 1, 1985 through December 31, 1985 where petitioner's claims were based on a policy statement of the Division of Taxation dated September 2, 1986 and applicable to tax years beginning on or after July 1, 1985.

FINDINGS OF FACT

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

Petitioner, USAir, Inc., and the Division of Taxation ("Division") entered into a Stipulation of Facts which was adopted in its entirety (with the deletion of references to exhibit numbers) as stated below.

On January 20, 1987, petitioner filed with the Division's Audit Bureau a CT-8, Claim for Credit or Refund of Article 13-A tax on petroleumbusinesses, covering the period April 1 through December 31, 1984, together with an amended CT-13-A, Tax Report for Petroleum Businesses, for the year 1984. The amount of petitioner's claim was $165,909.00.

On January 20, 1987, petitioner also filed with the Division's Audit Bureau a CT-8, Claim for Credit or Refund of Article 13-A tax on petroleum businesses, covering the period January 1 through December 31, 1985, together with an amended CT-13-A, Tax Report for Petroleum Businesses, for the year 1985. The amount of petitioner's claim was $57,863.00.

Petitioner's claims for credit were based on recalculations of tax as provided for in a then recently released Technical Services Bureau Memorandum, TSB-M-83(22.5)C, titled "Computation of Petroleum Subject to Tax under Article 13-A", and dated September 2, 1986. Since petroleum is fungible and aircraft fuel tanks may contain both imported and non-imported fuel, a determination had to be made as to what portion of the fuel consumed in New York was imported and therefore subject to the consumption tax included in Article 13-A. In accordance with prior Technical Services Bureau memoranda, TSB-M-83(22.1)C and TSB-M-83(22.5)C, the portion of fuel subject to the consumption tax was determined by the ratio of fuel imported for consumption to fuel imported for consumption and fuel purchased in New York.

TSB-M-83(22.5)C recognized that this prior method of calculation encouraged purchase of fuel outside New York State to the disadvantage of New York petroleum vendors:

> "An Article 13-A supplier may, in order to recoup the Article 13-A tax imposed on it, increase the price of its product to reflect such tax. Thus, a taxpayer who purchases all or part of its fuel in New York State will ordinarily pay an amount higher than one which purchases all of its fuel outside New York, since the New York purchaser may not give a Certificate of Consumption...for those purchases (only where title and risk of loss pass to the purchaser [outside] New York). A taxpayer which purchases all its fuel outside the state would pay the consumption tax only on the portion of such fuel consumed in the state. On the other hand, a taxpayer which purchases fuel within the state would pay, in addition to the consumption tax on the fuel imported and consumed in New York, an amount reflecting the tax paid by its supplier."

The rationale for the adoption of TSB-M-83(22.5)C can be illustrated by how the prior procedure operated:

Example I: A consuming airline purchases 60,000 gallons of fuel from vendors outside New York State which are Article 13-A taxpayers, with title to the fuel passing outside New York State. Certificates of Consumption are properly given by the airline to these vendors, allowing the vendors to reduce their taxable gross receipts for Article 13-A purposes. Because of this reduction, no tax is passed through to the airline in the form of higher prices.

The airline purchases 30,000 gallons of fuel from Article 13-A vendors with title passing to the airline within New York State. Certificates of Consumption cannot be given for in-state purchases. Hence, the vendors cannot reduce their taxable gross receipts for Article 13-A purposes, and the tax they are obligated to pay is passed through to the airline in the form of higher prices.

The airline also imports 25,000 gallons of fuel into New York in its fuel tanks. The airline had 40 flights during the year where the flight or a leg of the flight originated in New York and was destined for a point outside New York. There were no intrastate flights. And finally, fuel deemed consumed for the airline's type of aircraft was 1,000 gallons per take-off.

As provided in TSB-M-83(22.1)C the formula to be used in computing the airline's liability was as follows:

a = petroleum deemed consumed in New York
b = petroleum imported for consumption other than in fuel tanks
c = petroleum imported for consumption in fuel tanks
d = petroleum purchased in New York that was neither imported nor caused to be imported
t = petroleum subject to consumption tax

$$t = a \times \frac{b + c}{b + c + d}$$

a = 40,000 gallons (40 flights x 1,000 gallons per take-off)
b = 60,000 gallons
c = 25,000 gallons
d = 30,000 gallons

$$t = 40{,}000 \times \frac{60{,}000 + 25{,}000}{60{,}000 + 25{,}000 + 30{,}000}$$

t = 40,000 x 73.913%
t = 29,565 gallons consumed and subject to consumption tax

Thus, the airline pays tax passed through to it by the vendors of "d", i.e. on the 30,000 gallons purchased in New York, and on "t", the 29,565 gallons subject to consumption tax, for a total tax on 59,565 gallons.

Example II: Next, assume the facts in the preceding example, except that all fuel is imported (i.e. "d" = 0):

a = 40,000 gallons
b = 90,000 gallons
c = 25,000 gallons
d = 0

$$t = 40{,}000 \times \frac{90{,}000 + 25{,}000}{90{,}000 + 25{,}000}$$

t = 40,000 x 100%
t = 40,000 gallons consumed and subject to consumption tax

In this case the airline pays tax on only the 40,000 gallons subject to consumption tax.

Example III: And finally, assume the airline purchases nearly all its fuel in New York:

a = 40,000 gallons
b = 10,000 gallons
c - 25,000 gallons

d = 80,000 gallons

$$t = 40{,}000 \times \frac{10{,}000 + 25{,}000}{10{,}000 + 25{,}000 + 80{,}000}$$

t = 40,000 x 30.43%
t = 12,172 gallons consumed and subject to consumption tax

Thus, the airline in Example III pays tax to vendors of "d", i.e. on the 80,000 gallons purchased in New York, and on "t", the 12,172 gallons subject to consumption tax, for a total tax on 92,172 gallons. This is more than twice the tax paid when the same airline imports all of its fuel.

TSB-M-83(22.5)C revised the Division's policy. Specifically, it provided that, in computing the portion of petroleum consumed which is subject to tax, fuel purchased in New York is subtracted from fuel deemed consumed in New York. Petitioner made this subtraction on its amended returns notwithstanding the fact that TSB-M-83(22.5)C limited this calculation method to taxable periods beginning on or after July 1, 1985.

On July 27, 1987, the Division's District Office Audit Bureau responded to petitioner's claims for credit that ". . . this revised policy is effective for taxable periods beginning on or after July 1, 1985. Both of these amended reports begin before the revised policy effective date. Therefore your claims for refund are respectfully denied."

The parties agree that the calculations going into petitioner's claims for credit are accurate.

On August 28, 1987, in response to the denial of its claims for credit, petitioner petitioned the Tax Appeals Bureau of the New York State Tax Commission. These petitions were treated as requests for conciliation conference by the Bureau of Conciliation and Mediation Services. On August 11, 1988 a conciliation conference was held, and subsequently the conciliation conferee sustained the denial of petitioner's claims for credit without explanation. On October 21, 1988 a Conciliation Order was issued; on October 31, 1988 petitioner timely petitioned the Division of Tax Appeals; and on February 23, 1989 the Division served its Answer herein.

OPINION

The Administrative Law Judge determined that the first policy memorandum (TSB-M-83[22.1]C) contained a method of calculation of the tax for airlines which was inconsistent with the statute in that it imposed the consumption tax on a pro rata share of fuel purchased in New York by petitioner, a proposition which the Administrative Law Judge noted was conceded in the Division's brief at hearing. Further, the Administrative Law Judge determined that the original policy did not give effect to legislative intent. The Administrative Law Judge also determined that the second policy memorandum (TSB-M-83[22.5]C) dated September 2, 1986 with a stated effective date of June 1, 1985 was not merely a change in policy, but a necessary action by the Division to properly reflect the purpose of the 1984 amendments to tax only that fuel imported into New York and consumed in New York by airlines; that the Division acted arbitrarily in selecting an effective date of July 1, 1985 for the revised policy; that it was incumbent upon the Division to at least state its reasons for not allowing airlines to file claims for refund for all periods not barred by the statute of limitations in order that some evaluation could be made of the Division's reasons; and that, accordingly, the revised policy was applicable to petitioner and petitioner was entitled to a refund pursuant to the provisions of the revised policy.

On exception, the Division states that the statement in its brief at hearing that "the original method [in TSB-M-83(22.1)C] resulted in a pro rata share of fuel purchased in New York being subject to Article 13-A" was in error. The Division asserts that "there are at least two different methods of computing the consumption tax of Article 13-A which are in harmony with the statute (the methods outlined in TSB-M-83[22.1]C and TSB-M-83[22.5]C). The fact that the Division in 1986 prospectively adopted a different method of computing the tax does not invalidate the stated method of computation in effect during the period at issue" (Division's brief on exception, p. 3). The Division asserts that the method of computing the Article 13-A tax outlined in the first memorandum (TSB-M-83[22.1]C) was consistent with the provisions of Article 13-A and that the Division's decision not to retroactively apply the method of

computation in the second memorandum to all periods open under the statute of limitations (TSB-M-83[22.1]C) was reasonable.

Petitioner relies on the determination of the Administrative Law Judge and asserts that the first memorandum was not consistent with the underlying statute and that the succeeding interpretation was a "necessary corrective" to properly implement the underlying statute which must be applied ab initio and cannot be given effect as of an arbitrary date in the past without explanation or rationale (petitioner's brief on exception, pp. 2; 7).

We first review briefly the relevant sections of the Tax Law.

Article 13-A of the Tax Law was enacted in 1983 (L 1983, ch 400) to impose a tax on the "gross receipts from sales of petroleum" by a petroleum business which imports petroleum or causes petroleum to be imported into New York State for sale where shipments are made to points within the State (Tax Law § 301[a][i]). In 1984, the imposition of the tax was expanded to include "consideration given or contracted to be given for petroleum" by a petroleum business which imports petroleum or causes petroleum to be imported into New York State by a person other than one subject to tax under Article 13-A for consumption by such business in New York State (Tax Law § 301[a][ii]; L 1984, chs 67 and 68).[1]

"Gross receipts from sales of petroleum" does not include receipts from any sale to a purchaser where the consideration given by the purchaser is taxable pursuant to Tax Law § 301(a)(ii) as "consideration given or contracted to be given for petroleum" purchased for the purchaser's own consumption. However, to avoid the statutory presumption that all receipts are "gross receipts," the seller must obtain and accept in good faith from the purchaser a

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[1] The purpose of the 1984 amendment was stated as follows:

> "Statement in support: This bill eliminates a potential loophole in Article 13-A that could provide a disincentive to petroleum sales in New York and permit avoidance of the tax by purchases from non-New York businesses. That inequitable loophole, if left unremedied, has significant adverse fiscal implications for the State; it also places New York petroleum businesses at a competitive disadvantage vis-a-vis foreign petroleum businesses. Its elimination ensures the receipt of budgeted revenues and enhances the equity of the tax" (Memorandum of State Executive Dept., 1984 McKinney's Session Laws of NY, at 3115).

"consumption certificate" in such form and under such terms and conditions as the Division may prescribe (Tax Law § 303[b][5]).

"Consideration given or contracted to be given for petroleum" generally means "the amount given or contracted to be given for such petroleum in cash . . ." (Tax Law § 303[a][2]). Consideration for aviation fuel is excluded from this definition (and, thus, is included as part of the gross receipts of the vendor) except "consideration given for aviation fuel consumed in this state" which is, thus, subject to the consumption tax (Tax Law § 303[c][3], emphasis added).

Tax Law § 303(c)(3) contains specific provisions for the computation of the amount of aviation fuel consumed in this State.[2]

Where the Commissioner of Taxation decides that, with respect to a certain petroleum business, any of these methods do not fairly and equitably reflect aviation fuel consumed in this State, the Commissioner can prescribe methods of attribution which fairly and equitably reflect aviation fuel consumed in this State (Tax Law § 303[c][3]).

The Division issued TSB-M-83(22.1)C (June 8, 1984) which described the method for the calculation of tax on fuel consumed in New York. The memorandum described generally the circumstances under which a purchaser is authorized to furnish a Certificate of Consumption to a supplier to avoid double taxation of petroleum imported or caused to be imported into New York.[3]

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[2]Where both the points of departure and arrival of any flight or any leg of any flight are within this State, the aviation fuel consumed in this state is presumed to be all the aviation fuel consumed during such a flight. Where only the point of departure of any flight or the leg of any flight is within the State, the aviation fuel consumed in this State is presumed to be all such fuel consumed during the takeoff. Where only the point of arrival is within the State, or where neither the point of arrival nor point of departure is within the State, none of the aviation fuel consumed during such flight shall be treated as consumed in this State (Tax Law § 303[c][3]).

[3]"NOTE: A Certificate of Consumption is considered proper only when given to an Article 13-A Taxpayer under the following circumstances. Title to the petroleum must pass outside New York State and the petroleum must be subsequently delivered into New York State by the seller or common or contract carrier, for consumption by the purchaser within New York State. The delivery must be made so that the seller is required to report the sale to New York as a New York sale pursuant to the destination rules under Article 9A, which are applicable to Article 13-A. If the delivery is made where the seller is not required to report the sale to New York as a New York sale pursuant to the destination rules under article 9-A, which are applicable to Article 13-A, the purchaser may not issue a Certificate of Consumption and the seller may not accept such Certificate for such transaction" (TSB-M-83[22.1]C, at 3, emphasis added).

It then specifically addressed the use of a Certificate of Consumption by a commercial airline and provided a formula to be used in computing an airline's tax liability on its 13-A returns. Essentially, the general rule governing issuance of certificates of consumption was applied to airlines, with the following results:

(1) An airline purchasing fuel from an out-of-state supplier not subject to tax under Article 13-A, could not issue a certificate of consumption to the supplier. The tax would then apply to consideration given for that portion of the purchased fuel imported into and consumed in New York by the airline.

(2) An airline purchasing fuel from a supplier subject to the Article 13-A tax could issue a certificate of consumption to the supplier where title to the petroleum passed outside New York. The supplier would then reduce its gross receipts subject to the Article 13-A tax by the amount of the airline's purchase (Tax Law § 303[b][5]), and the airline would be taxed on the consideration given for that portion of the fuel imported into and consumed by the airline in New York.

(3) An airline purchasing fuel from a supplier subject to the Article 13-A tax could not issue a certificate of consumption to the supplier if title to the fuel passed within New York. Under these circumstances, 100% of the purchases would be taxable to the 13-A seller of the petroleum. The memorandum assumed that the tax would be passed on by the seller to the airline as an increase in purchase price. "At the same time, the consuming airline will be taxed as an Article 13-A consuming taxpayer on the portion of petroleum imported or caused to be imported into this State for consumption by it in this State" (TSB-M-83 [22.1] C, at 9).

The Division issued TSB-M-83(22.4)C (April 22, 1985) which described the methodology for computing the amount of aviation fuel deemed consumed in New York State by various aircraft, and TSB-M-83(22.5)C (September 2, 1986) which revised the methodology for the computation of tax under Article 13-A contained in TSB-M-83(22.1)C effective June 1, 1985.

We deal first with whether the Administrative Law Judge was correct in determining that the formula in TSB-M-83(22.1)C was inconsistent with the language and purpose of the statute. We reverse the determination of the Administrative Law Judge on this issue.

The basis of the Administrative Law Judge's determination is stated in conclusion of law "C" of her determination as follows:

> "The 1984 amendment of article 13-A imposed a tax on consideration given or contracted to be given by a petroleum business for petroleum which it imports or causes to be imported into New York for consumption by it in New York (Tax Law § 301[a][ii]). Thus, consideration given for petroleum purchased in New York for consumption in New York is excluded from taxation. To the extent that the original formula imposed the consumption tax on a pro rata share of fuel purchased in New York, it brought about a result not intended by the statute" (emphasis added).

In our view, the formula does not result in imposition of tax on a pro rata share of the petroleum purchased in New York.[4] The formula merely includes such amount of petroleum in

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[4]As provided in TSB-M-83(22.1)C, the formula for computing the airline's liability was as follows:

a = petroleum deemed consumed in New York
b = petroleum imported for consumption other than in fuel tanks
c = petroleum imported for consumption in fuel tanks
d = petroleum purchased in New York that was neither imported nor caused to be imported
t = petroleum subject to consumption tax

$$t = a \times \frac{b + c}{b + c + d}$$

Assuming the following facts:

a = 40,000 gallons (40 flights x 1,000 gallons per take-off)
b = 60,000 gallons
c = 25,000 gallons
d = 30,000 gallons

The application of the ratio is as follows:

$$t = 40{,}000 \times \frac{60{,}000 + 25{,}000}{60{,}000 + 25{,}000 + 30{,}000}$$

t = 40,000 x 73.913%
t = 29,565 gallons consumed and subject to consumption tax

Thus, the airline pays tax passed through to it by the vendors of "d," i.e., the 30,000 gallons purchased in New York, and on "t," the 29,565 gallons subject to consumption tax, for a total tax on 59,505 gallons.

the denominator of the ratio for purposes of computing that portion of imported petroleum subject to consumption tax, "t." In fact, use of fuel purchased in New York, "d" in the denominator, always results in a fraction of less than 1 (one), meaning a lesser tax on imported petroleum deemed consumed in New York than would otherwise result if "d" were not used in this fashion.

Under the formula, the consumption tax is never imposed on more gallons than the taxpayer imported into the State. Further, the formula assumes that fuel purchased in New York is used on a pro rata basis with fuel imported into the State. The effect of this assumption does not impose the consumption tax on fuel purchased in New York, but only reduces the amount of imported fuel that is subject to the consumption tax. Thus, we see no basis for the statement that the formula imposes the consumption tax on a pro rata share of fuel purchased in New York.

Since the formula in TSB-M-83(22.1)C never imposed the consumption tax on New York purchases of fuel, the subsequent memorandum was not designed to eliminate this effect. As stated on its face, the subsequent memorandum was intended to ameliorate the following disparity:

> "A taxpayer which purchases all its fuel outside the state would pay the consumption tax only on the portion of such fuel consumed in the state. On the other hand, a taxpayer which purchases fuel within the state would pay, in addition to the consumption tax on the fuel imported and consumed in New York, an amount reflecting the tax paid by its supplier. This disparity is apparent where fuel consumed by the taxpayer exceeds that which it imports or where fuel is purchased in New York State but is consumed outside the state" (TSB-M-83[22.5]C).

Clearly, the goal of the subsequent memorandum was to lessen the disincentive created by the imposition of the gross receipts tax on fuel purchased in New York State. While this goal is in harmony with the 1984 amendments imposing the consumption tax, we see no basis to conclude that the prior policy was inconsistent with any provision of Article 13-A.

Under Article 13-A, fuel purchased within New York is subject to the gross receipts tax (Tax Law § 301[a][i]). Fuel consumed in New York, but purchased out-of-state from a person

not subject to Article 13-A tax is subject to the consumption tax (Tax Law § 301[a][ii]). The fact that a purchasing airline which purchases fuel within New York has the gross receipts tax passed through to it does not flow from the formula in the TSB-M-83(22.1)C, but from the statute itself.

Simply stated, there is nothing in the statute which provides an exemption from the gross receipts tax for the purchase of aviation fuel within New York State. The 1984 amendment merely added another basis for the tax, i.e., consideration for fuel purchased out-of-state from a person not subject to the Article 13-A tax for consumption in the State. No changes were made to the taxability on a gross receipts basis for fuel purchased within the State.

Therefore, we find that TSB-M-83(22.1)C was not inconsistent with either the language or the purpose of the statute.

We deal next with whether the Division's failure to explain why the revised policy was applicable only to taxable periods beginning on or after July 1, 1985, was arbitrary and wrong. We reverse the determination of the Administrative Law Judge on this issue.

The Administrative Law Judge determined that since the second TSB-M-83(22.5)C "was necessary because that formula [in the first TSB-M-83(22.1)C] achieved results which were contrary to the statute . . . it was incumbent upon the Division to at least state its reasons for not allowing taxpayers to file claims for refund for all periods not barred by the statute of limitations . . . in order that some assessment could be made of the Division's reasons." In other words, the Division had a responsibility to explain why taxpayers who followed an invalid policy of the Division could not benefit from the Division's new policy.

As we have already determined, the first TSB-M-83(22.1)C was not inconsistent with the statute and, thus, represented a proper statement to taxpayers by the Division of the policy that the Division would follow in interpreting the 1984 amendments to the Tax Law (see, Developing and Communicating Interpretations of the Tax Laws, A Report to the Governor and the Legislature Reviewing Department of Taxation and Finance Policies and Practices, March 1989 [a discussion of the use of Technical Service Bureau Memoranda by the Department]).

The reasons for the change from this policy to one concededly more beneficial to taxpayers was adequately explained in the second TSB-M-83(22.5)C. We find no legal requirement, under the circumstances herein, for the Division to explain the effective date of the new policy.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of USAir, Inc. is denied; and

4. The Division of Taxation's denial of petitioner's claim for a refund is sustained.

DATED: Troy, New York
January 9, 1992

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner