STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PETRO ENTERPRISES, INC. **F/K/A DAN'S GROCERY CORPORATION**	:	DECISION DTA No. 806301
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period December 1, 1984 through April 30, 1987.	:	

Petitioner Petro Enterprises, Inc., f/k/a Dan's Grocery Corp., 63 Richfield Street, Lockport, New York 14094 filed an exception to the determination of the Administrative Law Judge issued on January 25, 1991 with respect to its petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period December 1, 1984 through April 30, 1987. Petitioner appeared by Robert A. Zucco, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in opposition to the exception. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether a grade of kerosene, known as "K-1," constituted a diesel motor fuel under Tax Law former § 282-a.

II. Whether, as a result of an audit, the Division of Taxation properly determined additional diesel motor fuel tax due.

III. Whether the Administrative Law Judge erred in precluding petitioner from attempting to prove that it was the subject of selective enforcement of the tax laws.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

On July 31, 1987, following an audit, the Division of Taxation (hereinafter the "Division") issued to petitioner,[1] Dan's Grocery Corp., Thrifty Oil Division, a Notice of Determination of Tax Due under Article 12-A of the Tax Law which assessed $54,868.67 in tax due, plus penalty and interest, for the period December 1, 1984 through April 30, 1987.

During the period at issue, petitioner, doing business under the name "Thrifty Oil", was engaged in the retail sale[2] of various petroleum products, including gasoline, diesel fuel, fuel oil, and kerosene. Petitioner was registered as a distributor of diesel motor fuel. Most of petitioner's fuel oil and kerosene sales were made by home delivery. Petitioner's facility was located at 63 Richfield Street, Lockport, New York and consisted of an oil tank farm and a retail service station. The retail station had a number of islands containing metered pumps through which product was sold to customers. One such island contained two metered pumps each designated "Diesel". These pumps were connected to an underground storage tank. This tank was supplied with product from petitioner's tank farm by petitioner's home heating oil delivery trucks. Another island contained a single metered pump which bore the designation "Fuel Oil" and indicated thereon "For Home Heat Only". This pump was fed directly from one of petitioner's large "tank-farm" oil tanks. Petitioner also had a metered pump through which petitioner sold a grade of kerosene, known as K-1. This kerosene pump was fed by an above-ground 10,000 gallon tank. The kerosene pump bore a sign which stated: "Not For Use In A Diesel Motor Vehicle."

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[1]Petitioner subsequently changed its name to Petro Enterprises, Inc., and, in fact, filed its petition under its new name, but has continued to conduct business under the name "Thrifty Oil."

[2]As used in this finding, retail sale refers to sales to ultimate consumers and not to the definition of "retail sale" contained in Tax Law former § 282-a.

All of petitioner's metered pumps were self-service and all were accessible to motor vehicles. All pumps were electronically connected to a console controlled by petitioner's cashier. The cashier, stationed in a small building nearby, could observe all activity at the pumps, and could, by operating the console, turn off any of the pumps at any time.

The product sold through the pumps designated "Diesel" and "Fuel Oil" was identical during warm weather months. In colder weather, the product sold through the "Diesel" pumps was blended with an additive by petitioner to prevent the product from gelling.

Petitioner collected and remitted tax due under Article 12-A with respect to sales made through the pumps designated "Diesel". Petitioner did not collect tax under Article 12-A with respect to any sales made through the fuel oil or kerosene pumps.

On audit, the Division reviewed petitioner's purchase and sales records. Based upon its review of such records, the Division concluded that petitioner properly collected and reported diesel motor fuel tax with respect to substantially all of the 226,284 gallons of fuel sold through the pumps designated diesel. The Division also reviewed invoices documenting residential fuel sales and concluded that petitioner had sufficiently documented sales of diesel fuel by home delivery (such sales being for home heating purposes and thus not subject to tax under Article 12-A). With respect to sales made through the fuel oil and kerosene pumps, the Division requested documentation of specific sales. Petitioner did not maintain documentation of any specific sales. Petitioner did maintain daily pump readings which showed daily totals of gallons sold through each pump. The Division concluded that, in the absence of documentation of specific nontaxable sales, all sales through the fuel oil and kerosene pumps were properly subject to diesel motor fuel tax. The Division used petitioner's records of daily pump readings and determined that petitioner sold 210,389 gallons of fuel oil and 337,978 gallons of kerosene during the audit period. The Division assessed diesel motor fuel tax of ten cents per gallon on these sales and issued the assessment in dispute herein.[3]

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[3]The Division also assessed $31.97 in tax on petitioner's underreporting with respect to 319.7 gallons of fuel sold through the "Diesel" pumps during the audit period. This part of the assessment was not contested.

Petitioner conceded that fuel oil and kerosene were sold in the total amounts determined by the Division, but took the position that all such sales were nontaxable under Article 12-A.

Petitioner's retail station was open from 7:00 A.M. to 7:00 P.M.

As noted previously, petitioner's kerosene pump sold K-1 kerosene. This grade of kerosene has a low sulphur content and is cleaner burning than regular kerosene. K-1 kerosene is commonly used in space heaters.

Petitioner sold some amount of kerosene and fuel oil from the pumps in question which was dispensed into portable containers.

In addition to the facts found by the Administrative Law Judge, we find the following:

> Petitioner stated in its petition that "[t]he taxpayer has been the subject of arbitrary, capricious, and unlawful selective enforcement. No other taxpayers who follow the same procedure as the Petitioner herein with respect to sales of home heating oil and kerosene have been subjected to audit and assessment" (Exhibit B, petition). At the hearing, petitioner's representative asked the Division's auditor: "Did you for this period in question conduct any other audits in the area, Niagara County, Erie County, of this type of situation, selling---." The question was interrupted by the Division's objection on the grounds of relevancy. The Administrative Law Judge addressed this objection by opining, in part: "I don't want to get into whether the Department failed to proceed against other taxpayers who may have improperly failed to pay tax or not . . . I don't think that this notice is in any way affected by whether or not other taxpayers in this area were either properly or improperly conducting their business." The Administrative Law Judge ultimately sustained the objection.
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> The Administrative Law Judge's ruling and statements precluded petitioner from attempting to introduce any evidence of selective enforcement.

OPINION

The Administrative Law Judge determined that K-1 kerosene was diesel motor fuel within the meaning of Tax Law former § 282-a. Further, the Administrative Law Judge concluded that petitioner did not prove that all of its kerosene and fuel oil sales were not retail sales. The Administrative Law Judge noted that petitioner did prove that it made some nontaxable sales but that petitioner failed to identify specific nontaxable sales. In addition, the Administrative Law Judge rejected petitioner's contention that it was not required to keep records of these sales.

On exception, petitioner asserts that K-1 kerosene is not "commonly used in the operation of an engine of the diesel type" and, thus, is not diesel motor fuel within the meaning of Tax Law former § 282-a. Petitioner also contends that it was not required to keep records of the fuel sold through the K-1 and the "home heating only" dispensers and that it did prove that these sales were not retail sales through the evidence that it offered. Next, petitioner asserts that the Administrative Law Judge erred in not addressing petitioner's claim that the record keeping regulation at 20 NYCRR 420.8(d) is arbitrary, capricious and unreasonable. Finally, petitioner argues that the Administrative Law Judge also erred in refusing to allow petitioner to present evidence in support of its claim of arbitrary, capricious and unlawful selective enforcement.

In response, the Division argues that the Administrative Law Judge properly determined that the evidence of selective enforcement was irrelevant because "[i]t is clear that the 'evidence' of which the Petitioner seeks is merely raising a question of whether other audits were conducted during the same time period" (Division's letter dated May 2, 1991). Finally, the Division asserts that the Administrative Law Judge was correct in not addressing certain allegations made by petitioner in its petition because petitioner did not prove these allegations at the hearing.

We agree with petitioner that the Administrative Law Judge erred in not allowing petitioner the opportunity to introduce evidence to support its claim of selective enforcement. We recognize that to establish an unconstitutional claim of selective enforcement:

> "there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification" (Matter of 303 West 42nd St. Corp. v. Klein, 46 NY2d 686, 416 NYS2d 219, 223).

It may be, as the Division suggests, that petitioner intended to establish only the first element, that the law was not applied to others, and was not prepared to attempt to prove the second element, that the selective enforcement arose from an intentional invidious plan of discrimination on the part of the Division (see, Matter of G & B Publ. Co. v. Department of Taxation and Fin., 57 AD2d 18, 392 NYS2d 938, 940, lv denied 42 NY2d 807, 398 NYS2d 1029, citing Matter of Di Maggio v. Brown, 19 NY2d 283, 279 NYS2d 161). However, since

petitioner was denied any opportunity to offer evidence to support his claim, we cannot at this point determine what petitioner intended to prove.[4] Therefore, we conclude that this matter must be remanded to the Administrative Law Judge to conduct a further hearing and to render a further determination solely on the issue of whether petitioner was the subject of unconstitutional selective enforcement of the tax laws by the Division. Such further hearing is to be scheduled and such further determination is to be rendered as quickly as possible.

We are mindful that a taxpayer's claim of selective enforcement does not allow or require the Division to disclose tax information that is confidential, protected information (Matter of Manufacturers Trust Co., 269 AD 108, 53 NYS2d 923, affd 296 NY 549). Although Article 12-A does not contain an explicit secrecy provision, certain information that a petitioner may desire, with respect to other taxpayers, may be confidential information and not disclosable by the Division (see, Matter of Thaler v. Murphy, 42 Misc 2d 1, 247 NYS2d 816). However, the possibility that protected information may be requested does not justify precluding petitioner from posing questions or otherwise requesting information. At the remanded hearing, the parties and the Administrative Law Judge will be able to address the issue on a question by question basis to determine whether any specific question requires the Division to divulge confidential information (see, Matter of KLM Royal Dutch Airlines v. New York State Tax Commn., 87 AD2d 902, 449 NYS2d 358).

Since we have determined that this matter must be remanded to the Administrative Law Judge for a further hearing to allow petitioner to offer evidence of unlawful selective enforcement, it would be premature for us to render a decision on the substantive aspects of the Administrative Law Judge's determination. Therefore, we will retain jurisdiction over this exception while the matter is on remand to the Administrative Law Judge. If either party files a timely exception to the Administrative Law Judge's determination on the issue of selective

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[4]Although the petition does not specifically allege intentional, invidious discrimination, the allegation of "arbitrary, capricious and unlawful selective enforcement" necessarily includes an assertion of intentional discrimination because the selective enforcement cannot be unlawful unless the result of intentional discrimination (cf., Matter of Capitol Cablevision Sys. v. State Tax Commn., 98 AD2d 100, 470 NYS2d 906; Matter of G & B Publ. Co. v. Department of Taxation & Fin., supra [where the taxpayers' pleadings did not charge the Tax Commission with intentional discrimination]).

enforcement, such exception will be consolidated with the instant exception and a single Tribunal decision will be issued. If no exception is taken to the Administrative Law Judge's determination on the issue of selective enforcement, we will issue a decision on the instant exception alone.

Accordingly it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge for further proceedings consistent with this decision.

DATED: Troy, New York
September 19, 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