

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>BRAY TERMINALS, INC.</b>	:	DECISION
	:	DTA No. 807095
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 1984 through 1986.	:	

---

Petitioner Bray Terminals, Inc., 16 Pearl Street, P.O. Box 965, Glens Falls, New York 12801, filed an exception to the determination of the Administrative Law Judge issued on October 5, 1995. Petitioner appeared by Featherstonhaugh, Conway, Wiley & Clyne, LLP (James D. Featherstonhaugh, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Each party also filed a supplemental brief. Oral argument was heard on May 9, 1996.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Jenkins and Pinto concur.

***ISSUES***

Whether the Division of Taxation was entitled to an order granting it summary determination in this proceeding.

***FINDINGS OF FACT***

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

Following an audit conducted by the Division of Taxation ("Division"), petitioner, Bray Terminals, Inc. ("Bray"), was assessed for additional franchise tax found to be due for the years 1984, 1985 and 1986 by three notices of deficiency dated March 22, 1988, as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Interest</u>	<u>Total</u>
12/31/84	\$ 63,688.00	\$18,705.58	\$ 82,393.58
12/31/85	\$ 71,234.00	\$10,748.95	\$ 81,982.29
12/31/86	\$ <u>40,113.00</u>	\$ <u>1,906.42</u>	\$ <u>42,019.42</u>
Totals	\$175,035.00	\$31,360.95	\$206,395.95

The notices were reviewed by the Bureau of Conciliation and Mediation Services and, by Conciliation Order dated May 19, 1989, the statutory notices were sustained reflecting no change.

Thereafter, Bray filed a timely petition with the Division of Tax Appeals which was received on July 7, 1989, seeking redetermination of the deficiencies on the grounds that Article 9-A's "addback provision", specifically Tax Law § 208(9)(b)(4), was unconstitutional and illegal in that it violated the Commerce Clause, denied petitioner equal protection and amounted to impermissible double taxation.

Petitioner's argument with respect to interstate commerce is that Article 9-A impermissibly discriminates against suppliers such as Bray who import petroleum for sale into New York State to the detriment of interstate commerce. Suppliers and distributors who purchase petroleum within the State and sell or consume such petroleum in the State, are allowed to deduct the gross receipts tax paid from their income to establish their franchise tax liability, unlike those who import or cause to be imported petroleum products into the State of New York. This distinction, petitioner argues, discriminates against supporting suppliers such as Bray.

The petition also argues that the addback requirement of Article 9-A amounts to a tax on a tax. Since Tax Law § 208(9)(b)(4) provides that a taxpayer's entire net income is determined without exclusion, deduction, or credit of taxes imposed under Article 13-A (the gross receipts tax ["GRT"]), the Division maintains that Bray must treat as income for State franchise tax purposes the New York State gross receipts taxes it previously paid. As a result, since Article

9-A imposes a tax of 10% on the corporation's entire net income, the artificial increase in income by the GRT amounts to a 10% tax on the GRT.

At approximately the same time that petitioner pursued its administrative remedies with the Division of Tax Appeals, it also initiated a declaratory judgment action in the New York State Supreme Court, Nassau County. Such action sought a declaration that Article 9-A as applied to petitioner resulted in an unconstitutional denial of rights guaranteed by the Commerce Clause and the State and Federal Equal Protection clauses. Although the action did not seek a judgment as to the constitutionality of Article 13-A, the same was addressed by the court. As to Bray, the declaratory judgment action was unsuccessful, and resulted in the dismissal of its complaint, holding that Article 9-A and Article 13-A were constitutional. Bray (along with other plaintiffs) appealed the decision to the Appellate Division which affirmed the judgment. An appeal was rejected by the Court of Appeals, and lastly, the U.S. Supreme Court denied a petition for certiorari on June 6, 1994 (Bray Terminals v. New York State Dept. of Taxation & Fin., Sup Ct, Nassau County, June 19, 1990, affd 191 AD2d 668, 596 NYS2d 717, appeal dismissed 82 NY2d 748, 602 NYS2d 806, lv denied 82 NY2d 664, 610 NYS2d 151, cert denied \_\_ US \_\_, 128 L Ed 2d 888).

The Division attempted to encourage petitioner to voluntarily withdraw the petition in question subsequent to the denial by the Supreme Court to review petitioner's case. When petitioner failed to withdraw the petition, the Division made a motion before the Division of Tax Appeals to dismiss the petition on the grounds that it failed to state a cause of action and was barred by the doctrine of res judicata. The Division also sought sanctions under Tax Law § 2018 for the commencement or maintenance of a frivolous action.

Petitioner submitted an affidavit in opposition to the Division's Motion to Dismiss claiming that a subsequent Albany County Supreme Court decision, Tug Buster Bouchard v. Wetzler (NYLJ, July 11, 1994 [Sup Ct, Albany County]), upholding a facial challenge to Article 13-A, required the filing of a petition in order for Bray to protect its right. Petitioner maintains that if Article 13-A is unconstitutional, the Division could not require petitioner to "addback"

the GRT when computing its annual franchise tax liability under Article 9-A. The Division, in its reply affirmation, stated that Tug Buster was not applicable to the particular provision of the Tax Law questioned by Bray. In addition, to the extent applicable, Tug Buster was directly at odds with the results of the declaratory judgment action initiated by Bray.

Sua sponte, Administrative Law Judge Catherine M. Bennett converted the Division's Motion to Dismiss to a Motion for Summary Determination, pursuant to the Tax Appeals Tribunal Rules of Practice and Procedure and the CPLR.

Petitioner claims that during tax years 1984, 1985 and 1986 it accounted for the GRT as a pass-through item, rather than including GRT as income and thereafter deducting the taxes as an expense. Petitioner provided two affidavits in this matter in support of its position and as a means of explanation. The first was that of Dana Bray, president of Bray Terminals. He stated:

"For taxable years 1984, 1985 and 1986, Bray did not deduct Gross receipts tax collected from its Federal income for purposes of determining its entire net income for Article 9A corporate franchise tax liability.

"In fact, the gross receipts tax was handled as a pass through item. Billings to the customers for the tax were credited as a liability on the balance sheet and not included in income. Payments of the tax were recorded as a reduction of the liability account and were not recorded as an expense item. As a result, no adjustments were made for income tax purposes."

The second affidavit was that of petitioner's representative. It set forth petitioner's opposition to the converted motion and reiterated petitioner's position on each of the issues.

#### ***OPINION***

In her determination, the Administrative Law Judge converted the Division's Motion to Dismiss to a Motion for Summary Determination and sustained the notices of determination dated March 22, 1988 which were issued to petitioner. In its exception, petitioner reiterates the arguments it presented to the Administrative Law Judge:

(a) The Division was not entitled to summary determination because material issues of fact exist; however, regardless of whether material issues of fact exist, not allowing petitioner to deduct the tax paid pursuant to Article 13-A from its entire net income for

purposes of determining its corporate franchise tax liability pursuant to Article 9-A amounts to impermissible double taxation; and

(b) Petitioner has set forth a cause of action entitling it to a refund of Article 13-A tax paid because Tax Law Article 13-A discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution.

The Division, in opposition, argues that:

(a) No material and triable issues of fact exist which would preclude granting a motion for summary determination nor does double taxation exist since the two taxes (gross receipts tax and corporate franchise tax) are imposed on different bases. However, if double taxation did result, it was clearly intended by the State Legislature;

(b) Petitioner has not stated a cause of action challenging the constitutionality of Article 13-A nor has petitioner established a Commerce Clause violation; and

(c) The declaratory judgment in Bray Terms. v. New York State Dept. of Taxation & Fin. (supra) is entitled to res judicata treatment and should bar petitioner's Article 13-A constitutional claim.

### ***DOUBLE TAXATION***

Petitioner argues that when Article 13-A tax is added back to petitioner's Federal net income for purposes of the Article 9-A tax, this results in double taxation. It argues that double taxation is prohibited unless it is specifically authorized by the Legislature. In order to sustain a double tax, petitioner asserts that the Division must prove either express language or manifest intent on the part of the Legislature to enact such a scheme. Petitioner states that such proof has not been provided.

The Administrative Law Judge concluded that the specific reference in Tax Law § 208(9)(b)(4) to the addback of Article 13-A taxes is a clear statement of the intent of the Legislature:

"Rules of construction, for the purpose of interpreting ambiguity in a statute, are aids in the search for legislative intent. However, these rules have no function where there is no ambiguity. Where a statute's meaning is clear, it must be enforced as written. 'There is no more persuasive

evidence of the purpose of a statute than the words with which the Legislature undertook to give expression to its wishes' (1 Merten, Law of Federal Income Taxation § 3.05). . . . While there is an inherent reluctance to impose a double tax, there is no absolute prohibition against double taxation (1 Mertens, Law of Federal Income Tax § 3.59). Where the lawmaking body has clearly expressed its intention, the statute must be sustained even though double taxation results (Remco S.S. Co. v. Commr., 82 F2d 988; 36-1 US Tax Cas ¶ 9212, cert denied 299 US 555, 81 L Ed 409; Fort Smith Lumber Co. v. Arkansas, 251 US 532, 64 L Ed 396).

"In this case, the intent of the Legislature was to create a privilege tax for the purpose of raising additional revenue. There has been no evidence introduced to the contrary. Regardless of how the tax is imposed and calculated, the language of the statute is clear and must be sustained even in light of the fact that double taxation in some form may occur in the calculation of this provision. Thus, petitioner's entire net income for purposes of Article 9-A should include Article 13-A taxes paid to New York State for the periods in question" (Determination, conclusion of law "E").

We find that the Administrative Law Judge correctly and adequately addressed all of the arguments raised before her on the issue of double taxation and we find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect.

***CAUSE OF ACTION PURSUANT TO ARTICLE 13-A***

Petitioner argues that it has presented a viable and justiciable claim for relief because Article 13-A of the Tax Law violates the Commerce Clause of the United States Constitution. Petitioner does not argue that this Tribunal has jurisdiction to consider claims based on the facial constitutionality of a statute. However, petitioner argues that Article 13-A, as applied to it, is unconstitutional and, therefore, petitioner is entitled to a refund of the amount of Article 13-A tax it has paid. What petitioner neglects to demonstrate is how such a claim can properly be before us at this time.

Petitioner, in its brief in support of its exception, argues that: "[e]ven if respondent has met its burden . . . of demonstrating the absence of material and triable issues of fact, the motion [to dismiss] must fail because petitioner on the record as a whole, including this brief, has plead several legally sufficient causes of action" (Petitioner's brief in support, p. 13). Further, petitioner argues: "[t]herefore, in examining the record as a whole, the trier of fact is to

liberally construe the submissions to determine whether the non-movant has stated a cause of action, not just the cause of action specifically challenged by the opposition" (Petitioner's brief in support, p. 19).

Petitioner continues to argue that when a motion for summary determination originates from a motion to dismiss for failure to state a claim, the pleadings are deemed to be true, citing Bailey v. Diamond Intl. Corp. (47 AD2d 363, 367 NYS2d 107). The Administrative Law Judge concluded that petitioner's argument was incorrect and stated:

"[t]he court's comments [in Bailey] with regard to the pleadings are consistent with the general principles guiding motions for summary determination. It stated: 'on this motion for summary judgment [initially a motion to dismiss for failure to state a cause of action] the criterion to be applied is whether the plaintiffs have a cause of action, not whether they have properly stated one' (id., 367 NYS2d at 110)" (Determination, conclusion of law "B").

Unlike State Supreme Court, the Division of Tax Appeals is a forum of limited jurisdiction. Tax Law § 2000 states, in applicable part, that the Division of Tax Appeals is responsible for:

"processing and reviewing petitions, providing hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of this chapter, rendering determinations and decisions and all other matters relating to the administration of the administrative hearing process. The administrative hearing process is the process commenced by the filing of a petition protesting a notice issued by the commissioner of taxation and finance of a determination of tax due, a tax deficiency, a denial of a refund or credit application. . . or any other notice which gives a person the right to a hearing under this chapter" (Tax Law § 2000).

The instant proceeding was brought by petitioner to challenge an assessment of additional corporate franchise tax pursuant to Article 9-A of the Tax Law. This is the only "cause of action" that is properly before us. As petitioner itself acknowledges in its brief:

"the Article 13-A claim arises out of a different transaction and is of a different nature and/or object than the claims arising out of the Article 9-A cause. . . .

"The Article 13-A claim, although arising out of the same course of dealing, attacks a different provision of the Tax Law, and opposes a tax levied on different event[s]; one on the sale of petroleum and the other on

corporate income. These taxes are calculated in a different manner and are made payable at different times. The causes are further distinct in that an attack on Article 9-A need not include an attack on Article 13-A" (Petitioner's brief in support, p. 27).

In order for the Division of Tax Appeals to have jurisdiction to review petitioner's claim of entitlement to a refund of tax paid pursuant to Article 13-A of the Tax Law, whether on constitutional or other grounds, it is incumbent on petitioner to have first filed a claim for refund with the Division (see, Tax Law § 315). On the denial of such a claim by the Division, petitioner would then have the right to proceed to the Division of Tax Appeals for review of the Division's denial. There is no evidence, nor even an allegation, that any request for a refund of tax paid pursuant to Article 13-A was ever made to the Division. If such a refund claim had been filed, surely the Division would assert, as a bar to granting the refund, the expiration of the statute of limitations which it has raised in its brief (Division's brief in opposition, p. 18). However, we need not reach that point because petitioner has shown no basis on which it may assert, for the first time before the Division of Tax Appeals, its claim for a refund of tax paid pursuant to Article 13-A of the Tax Law or a basis on which it has the right to a hearing before us on its alleged entitlement to such refund. Therefore, we are jurisdictionally precluded from considering petitioner's claim.

Instead of a claim for a refund of taxes pursuant to Article 13-A, petitioner has presented in its affidavit in opposition to the respondent's motion an argument that, if Article 13-A is unconstitutional, then petitioner cannot be required to add the amount of gross receipts tax remitted into its entire net income for purposes of Article 9-A of the Tax Law. Petitioner did not pursue this argument before the Administrative Law Judge nor before this Tribunal. Petitioner has offered no support for this position and we likewise find no authority for it. As the Division argues, if petitioner was successful in its position and the tax paid pursuant to Article 13-A was to be refunded to petitioner, that refunded amount would be included for the years at issue as part of petitioner's entire net income for purposes of Article 9-A (Division's brief in opposition, p. 18).



***MATERIAL ISSUES OF FACT***

Pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]), after issue has been joined, a motion for summary determination shall be granted if:

"the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact."

Petitioner argues that there are material issues of fact which preclude a summary determination in this proceeding. We disagree. The Administrative Law Judge concluded that:

"[t]he only facts raised by petitioner that could potentially be construed as 'triable issues of fact,' defeating a motion for summary determination, are those relating to the accounting of GRT for Federal income tax purposes. . . .

"Even though the GRT was never deducted from Federal gross income, the income reported was at 'net,' as though the income and corresponding expense had been properly recorded. Adding back the tax not deducted (because of the use of a 'pass-through' liability account) places petitioner in no different position with respect to the calculation of New York ENI than if petitioner had utilized income statement accounts. The only possible effect would be a timing difference due to the accrual of the liability. To this extent how petitioner handled the GRT is immaterial. Accordingly, it is concluded that there are no material triable issues of fact that would require dismissal of the motion for summary determination" (Determination, conclusion of law "D").

The Administrative Law Judge correctly and adequately addressed this issue and we find no basis in the record before us for modifying the Administrative Law Judge's determination thereon. Based on all of the foregoing, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Bray Terminals, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Bray Terminals, Inc. is denied; and

4. The notices of deficiency dated March 22, 1988 are sustained.

DATED: Troy, New York  
February 13, 1997

/s/Donald C. DeWitt  
Donald C. DeWitt  
President

/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner