STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BARRIER OIL CORPORATION	:	DECISION DTA NO. 809984
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Years 1984, 1985 and 1986.	:	

Petitioner Barrier Oil Corporation,[1] c/o Carl S. Levine, Esq., Carl S. Levine & Associates, P.C., 1800 Northern Boulevard, Suite 304, Roslyn, New York 11576, filed an exception to the order of the Administrative Law Judge issued on September 3, 1998. Petitioner appeared by Carl S. Levine & Associates, PC (Carl S. Levine, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioner's request, was heard on February 2, 1999 in Troy, New York.

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

ISSUE

Whether petitioner has met its burden of proof to demonstrate that a stipulation of discontinuance entered into by petitioner and the Division of Taxation on December 14, 1993

[1]Petitioner Barrier Oil Corporation is now known as Barrier Motor Fuels, Inc.

should be modified by substituting for the term "minimum interest" used in that stipulation the term "six percent per annum."

FINDINGS OF FACT

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

On December 14, 1993, petitioner by its representative, attorney Carl S. Levine, and the Division of Taxation ("Division") by its representative, attorney Michael B. Infantino, executed a "Stipulation for Discontinuance of Proceeding" ("stipulation for discontinuance")[2] with reference to this matter which provided as follows:

> The above-entitled proceeding having been resolved, it is hereby stipulated and agreed by and between the parties herein that such proceeding be and the same is discontinued, *with prejudice*, and that the deficiency/determination or refund is recomputed as follows:
>
> | | |
> |---|---|
> | Deficiency/determination | $297,851.10 |
> | Interest | Minimum |
> | Penalty | None |
>
> (Emphasis added.)

The stipulation for discontinuance resolved between the parties three notices of deficiency, each dated April 20, 1989, which had asserted tax, interest, and penalty against petitioner in the following amounts:

[2]The stipulation for discontinuance was prepared on a Division of Tax Appeals ("DTA") form TA-30.2, which is one of three forms adopted by the Tax Appeals Tribunal to allow parties to notify DTA of a decision to discontinue a proceeding.

Period Ended	Tax	Interest	Penalty
December 31, 1984	$279,523.75	$139,241.88	$ 69,880.94
December 31, 1985	161,119.12	53,600.86	40,279.78
December 31, 1986	30,574.30	6,509.72	7,643.58
Totals	$471,217.17	$199,352.46	$117,804.30

Although the above three notices of deficiency were the subject of petitioner's request for conciliation conference dated July 14, 1989 and its subsequent petition, the motion at issue addresses the calculation of interest on the tax deficiencies for only 1984 and 1985 and not 1986.

In the respective requests for conciliation conference for each of the three years originally at issue, petitioner included the following request with regard to the imposition of penalty and interest:

> If any liability is ultimately assessed, simple interest and no penalties should be applied based on the taxpayer's good faith intent to comply with the complex, constantly changing and vague regulations, as well as giving complete cooperation to the State to aid in determining the proper tax liability.

The record created for this motion does not include a copy of the petition. Consequently, it is not possible to find whether the petition included a similar provision with regard to the imposition of penalty and interest.

An administrative hearing was commenced in this matter on February 23, 1993 and continued on October 14, 1993. At the hearing on October 14, 1993, the parties stated on the

record that they had reached a resolution[3] of this matter but for two issues which the parties requested additional time to address through negotiations. They predicted that the matter would be resolved without any further litigation. The parties also indicated that petitioner would be given three to five years to pay the settlement amount under a deferred payment agreement, and specified on the record that they had agreed that petroleum business tax in the amount of $302,736.00 was due from petitioner subject to a further reduction if petitioner could document the Arco rebate program. Nonetheless, the hearing was continued to December 15, 1993:

> ALJ Barrie: Since the parties have not resolved the issue of penalty, and since there still is outstanding this adjustment for the rebate program with Arco, I am going to set a date for a continuation if necessary on these two areas. (Tr., pp. 207-208.)

However, when asked whether he had anything further to add before the record was closed on October 14, 1993, petitioner's representative added that there was another issue concerning "the deductibility for gross receipts tax purposes of bad debts" (tr., p. 209). The Administrative Law Judge responded by noting that neither the petition nor the statement of issues by petitioner's representative had raised this additional issue. The Division's representative indicated that "in the spirit of reasonableness . . . [the deductibility of bad debts] would be something else we would have to look at" if the Tax Appeals Tribunal or a court were to decide that bad debts were deductible for gross receipts tax purposes (tr., p. 211). Even so, the Administrative Law Judge advised the parties:

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[3]The Division had agreed to reduce the amount of petitioner's gross receipts subject to tax based upon a reduction in the cost per gallon which it used to calculate petitioner's gross receipts including (i) eliminating a 5¢ per gallon markup since petitioner's sales were made to a related corporation, (ii) a 2 ¾¢ per gallon reduction because petitioner did not recoup gross receipts tax from the related corporation to which sales were made, and (iii) a 2 ¼¢ per gallon reduction apparently based upon a further sampling of invoices.

> ALJ Barrie: I would just like to have it clear on the record that on December 15th, if we should reconvene, I would not permit the petitioner to raise the issue of the deductibility from gross receipts tax of the bad debts . . . unless before such date you [petitioner's representative] have requested in writing permission to amend your petition to assert that additional ground for relief, and we have had a response from the Division on that particular point. . . . Do you see what I am saying, gentlemen?
>
> Division's Attorney Infantino: Yes.
>
> Petitioner's Attorney Levine: I think the approach is fair. (Tr., pp. 213-214.)

Consequently, what was left for possible resolution at the continuation of the hearing scheduled for December 15, 1993 were issues concerning the abatement of penalty and an adjustment to petitioner's gross receipts for the rebate program with Arco. Neither party noted any issue between them concerning the calculation of interest on petroleum business (gross receipts) tax due from petitioner. On December 14, 1993, the day before the hearing in this matter was to be continued, the parties executed the stipulation for discontinuance detailed above, which reflected a further reduction of $4,884.82 in petroleum business tax due from petitioner ($302,735.92, the amount agreed upon at the hearing on October 14, 1993 less $4,884.82 equals $297,851.10, the amount stipulated as due) and the abatement of penalty.

Approximately two years later, the Division's Westchester District Office of its Tax Compliance Division ("Tax Compliance") issued a warrant which was docketed on November 9, 1995 against petitioner directing that the following tax with penalties and interest, which remained wholly unpaid, be satisfied out of petitioner's real and personal property located in Westchester County:

Assessment ID	Period Ending	Tax	Penalty	Interest	Assessment Total
L-010829112-4	12/31/84	$185,549.78	$1,858.61	$308,990.99	$496,399.38
L-010829111-5	12/31/85	111,676.26	1,116.76	152,544.55	265,337.57
Totals		$297,226.04[4]	$2,975.37[5]	$461,535.54	$761,736.95

The warrant specifically noted that the amount noted as due continued to accrue interest:

> Current interest rate *9.00% per year* on $758,761.58 from October 31, 1995
> The *interest rate may vary* according to the Tax Law. (Emphasis added.)

In November 1995, shortly after the docketing of the warrant detailed above, petitioner made a payment of $20,000.00 on tax due. In December 1995, petitioner made a second payment of $20,000.00 on tax due. On February 9, 1996, petitioner sold its customer lists for Westchester and Putnam Counties to Singer Holding Corporation and used $257,226.04 of the sale proceeds to pay off the remaining principal portions of the assessments for 1984 and 1985 (two payments of $20,000 plus $257,226.04 equals $297,226.04, the total *tax* due noted in the warrant). By a letter dated February 27, 1996, Tax Compliance notified petitioner that it relinquished its tax lien on petitioner's intangible assets consisting of the customer lists and telephone number sold to Singer Holding Corporation as a result of petitioner's payment of $257,226.04. However, Tax Compliance also noted that its tax lien remained effective on any other assets owned by petitioner.

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[4]The record on this motion does not explain the $625.06 difference between the amount stipulated as due of $297,851.10 and the amount of tax noted in the warrant of $297,226.04.

[5]The record on this motion also does not explain why penalty in the total amount of $2,975.37 was included in the warrant in light of the fact that the stipulation of discontinuance abated penalty.

Approximately two months after petitioner's payment of the tax due of $257,226.04, Tax Compliance issued a Deferred Payment Agreement dated April 4, 1996 projecting an amount for deferred payment of $563,781.12 calculated as follows:

Period Ending	Tax Due	Interest[6]	Current Amount Due
12/31/84	$145,547.21	$327,079.38	$472,626.59
12/31/85	111,676.26	162,807.56	274,483.82
Totals	$257,223.47	$489,886.94 Less downpayment Plus estimated additional interest accruing during the life of the DPA Projected DPA amount due	$747,110.41 (257,226.04) 73,896.75 $563,781.12

Petitioner refused to sign the deferred payment agreement. According to the affidavit dated April 27, 1998 of petitioner's attorney filed on this motion:

> After reviewing the 1996 Proposed DPA it became evident to Petitioner, for the first time, that the Tax Department had miscalculated the interest due on the Assessments pursuant to the Stipulation.

By a letter dated May 10, 1996 to the Division's attorney, Patricia L. Brumbaugh, petitioner's representative noted his disagreement with the calculation of interest due in the deferred payment agreement:

> The Tax Department asserts that Barrier owes $489,886.94 in interest for the period March 16, 1985 through the date of the Deferred Payment Agreement of April 4, 1996.

[6]The Division used the term "penalty & interest" in the proposed deferred payment agreement. Since penalty had been abated pursuant to the stipulation of discontinuance and the amounts shown represented "interest" only, the column heading "interest" is used above.

> Barrier, in turn, believes that it owes only $267,269.77 in interest for this period. Barrier used a 6% interest rate compounded daily to arrive at its figure.

The difference between the two amounts is $222,617.17.

Petitioner asserts that the term "minimum interest" means a rate of 6% per annum rather than the underpayment rates, ranging from 7½% to 12% per annum, used by the Division. The Division maintains that the underpayment rates represent the minimum interest that the Division may assert under the relevant statutory provisions.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge noted that while petitioner contends that it is seeking to have the stipulation merely interpreted and not set aside or disregarded, "petitioner is not merely seeking an interpretation but rather a modification of the stipulation for discontinuance by substituting for the terminology used in the stipulation of 'minimum' interest, the specific interest rate of 6%" (Determination, conclusion of law "B"). The Administrative Law Judge concluded that in order to do so, petitioner must establish fraud, malfeasance, or misrepresentation of a material fact.

The Administrative Law Judge concluded that petitioner did not meet its burden of proof in this regard. The Administrative Law Judge found that petitioner did not allege that the Division at any point represented that interest would be calculated at 6%. Although petitioner claimed that it first became aware of the method of interest calculation used by the Division upon the Division's issuance of the proposed deferred payment agreement, the warrant docketed against petitioner on November 9, 1995 clearly noted that the then current interest rate was 9.00% per year and that the interest rate may vary according to the Tax Law. Moreover,

petitioner did not raise any issue concerning the rate at which interest should be calculated at the hearing.

The Administrative Law Judge concluded that for periods after August 31, 1989, Tax Law § 1096 provided that the Commissioner of Taxation and Finance was to set the underpayment rates for taxes which included the petroleum business tax and publish these rates in the State Register. The rates set by the Commissioner, as noted by the Administrative Law Judge, ranged from 7% to 12% over the period September 1, 1989 to the date of his determination. Pursuant to Tax Law § 1096(e)(2), overpayment and underpayment rates of interest are based on the average prime rate charged by banks as of a specific date. However, Tax Law §§ 171(26) and 1096(e)(1) specify that the overpayment and underpayment rates of interest applicable to the petroleum business tax shall be (i) "not less than six percent per annum" and (ii) if no rates are set "shall be deemed to be set at six percent per annum," respectively. Consequently, under the applicable provisions of the Tax Law, the underpayment interest rate to be imposed on petroleum business tax due is the prime rate, but not less than 6% per annum.

The Administrative Law Judge noted that unlike interest imposed on assessments of sales and use tax, there is no penalty interest that may be imposed on petroleum business tax determined due. In the context of sales and use tax, the terminology of "minimum interest" is used to distinguish interest imposed at the underpayment rate from interest imposed on assessments which include penalty interest. While penalty interest may be abated under Tax Law § 1145(a)(1)(iii), only the portion of interest that exceeds the underpayment interest rates may be so abated. The underpayment interest rates for sales tax purposes which may not be abated are the same underpayment interest rates set for petroleum business tax determined due.

The Administrative Law Judge concluded that although the Division specified that "minimum" interest was to be applied, that does not mean that the Division has misrepresented the interest to be computed on the tax the parties stipulated was due. The interest computed based on the underpayment rates established by the Commissioner represents the minimum amount of interest due on petroleum business tax that has been determined due. Relying on our decision in ***Matter of Welco Ad Corp.*** (Tax Appeals Tribunal, November 23, 1994)**,** the Administrative Law Judge held that the Division is correct that there is no basis for abating interest to an amount less than the underpayment rates and petitioner has failed to establish that the Division misrepresented the rate at which interest would be calculated on the petroleum business tax it conceded was due.

ARGUMENTS ON EXCEPTION

Petitioner emphasizes on exception that the issue for resolution in this proceeding is not, as the Administrative Law Judge concluded, whether or not the Division misrepresented the meaning of certain terminology concerning the calculation of interest under the stipulation for discontinuance. Petitioner maintains that it does not want the stipulation set aside or disregarded, nor does it desire a hearing on the merits to address the amount of taxes and penalty abatement agreed to under the stipulation. Rather, petitioner argues that it seeks to compel the Division "to abide by its written agreement; Petitioner wants its contract enforced *as is*" (Petitioner's brief in support, p. 2, emphasis supplied). Petitioner argues that since the words and the language of the stipulation are clear and unambiguous, they must be given their plain meaning.

This language, argues petitioner, means that the rate at which petitioner is charged interest cannot be either the highest rate of interest lawfully allowed nor the regular rate charged to everyone else. Rather, it means the least or lowest rate possible; i.e., 6% per annum.

However, if petitioner were seeking a modification of the stipulation, it can prove that the Division misrepresented a material fact. Since the Division believes that it can only use a 6% rate of interest for an underpayment of taxes when the Commissioner fails to set the underpayment rate, and since the underpayment rate was already set for the period at issue by the Commissioner when the stipulation was drafted in December 1993, the Division was fully aware that it would never use the underpayment rate of 6% to calculate interest due on petitioner's underpayment of taxes. Thus, argues petitioner, it was underhanded and misleading for the Division to use the term "minimum" in the stipulation.

Petitioner argues that the Division has a statutory authority to abate interest pursuant to Tax Law § 3008 (Taxpayer's Bill of Rights) for interest attributable to certain delays or errors of Division employees. Petitioner also states that there is no statute or regulation specifically prohibiting the abatement of interest relating to Article 13-A taxes.

Petitioner also emphasizes that it will suffer unjustly if this matter is not reopened and the Division will receive a windfall if petitioner is forced to pay interest at a rate above 6% per annum. Since petitioner is entitled to rely on the Division's representation that interest was to be computed at the minimum rate of 6%, petitioner asserts that the Tribunal should reopen this proceeding to prevent a substantial injustice to petitioner.

The Division, in opposition, argues that the Administrative Law Judge correctly decided the issues before him in this proceeding and his order should be affirmed.

OPINION

We affirm the order of the Administrative Law Judge. In the first instance, we note that the Division of Tax Appeals is a forum of limited jurisdiction (***see***, Tax Law § 2000). In its exception, petitioner argues that it merely seeks to enforce the clear and unambiguous terms of the stipulation as they are written. Petitioner states alternatively that it does not seek to have the underlying proceeding reopened and is satisfied with the negotiated amount of tax liability and waiver of penalty obtained via the stipulation. However, petitioner also argues that it will suffer unjustly if this matter is not reopened.

Since the proceeding underlying the stipulation has been discontinued before us with prejudice, petitioner's disagreement with the Division concerns the amount which is ultimately due to the Division based on the terms of the stipulation entered into between the parties. If petitioner seeks to enforce the terms of the stipulation as it now exists and not reopen this proceeding, then petitioner's motion is directed toward the actions of the Division in the collection of unpaid tax and interest. The jurisdiction of the Division of Tax Appeals does not extend to collection proceedings (***Matter of Driscoll***, Tax Appeals Tribunal, April 11, 1991, ***citing Matter of Club Marakesh v. New York State Div. of Tax Appeals***, Sup Ct, Albany County, Nov. 7, 1990, Keniry, J.). Thus, petitioner's remedy of restraining the Division from collecting an amount of interest in excess of that to which petitioner argues it is entitled lies not with the Division of Tax Appeals but with a court of competent jurisdiction.

In the alternative, petitioner claims that failing to allow this proceeding to be reopened will result in substantial injustice to petitioner. In order to consider petitioner's request to reopen, we must view this matter as the Administrative Law Judge did; i.e., a request by

petitioner to modify the terms of the stipulation of discontinuance by substituting the specific interest rate of 6% for the term "minimum interest." In such a case, our jurisdiction to consider petitioner's request is also limited.

Pursuant to subdivision eighteenth of section 171 of the Tax Law, the Commissioner of Taxation and Finance shall:

> Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, *which agreement shall be final and conclusive*, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of this state, and (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded . . ." (emphasis added).

As the Administrative Law Judge concluded, the stipulation for discontinuance at issue was an agreement entered into by the Division pursuant to the authority subdivision eighteenth of section 171 of the Tax Law. This Tribunal has held that while it may be appropriate to reopen a closed matter in extraordinary circumstances, the need for finality of proceedings requires "a strict view of attempts by either petitioners or the Division to reopen or to reargue matters which have been closed" (***Matter of D & C Glass Corp***., Tax Appeals Tribunal, June 11, 1992). As we held in ***Matter of Felix Indus.*** (Tax Appeals Tribunal, July 22, 1993), the grounds set forth in subdivision eighteenth of section 171 of the Tax Law must be considered to be the sole grounds for the stipulation for discontinuance to be annulled, modified, set aside or disregarded. As we

stated in ***Felix***: "[e]rror by one or both of the parties is not a ground for reopening or modifying such an agreement" (***Matter of Felix Indus.***, ***supra***).

Petitioner acknowledges that the "issue of interest was not specifically discussed before the A. L. J. and court reporter at the hearing" (Petitioner's affidavit in support of motion, p. 9, ¶ 45). In paragraph 46 of that same document, petitioner states that the "subjective intent of the parties [on this issue] is not readily ascertainable and that they were both represented by counsel" (Petitioner's affidavit in support of motion, p. 9, ¶ 46). Petitioner does not allege in his petition that petitioner and the Division actually agreed on the 6% interest per annum as a part of their settlement. While petitioner argues on exception that the Division misrepresented the rate of interest it intended to charge by its use of the term "minimum" in the stipulation, petitioner does not allege that the Division at any point represented that interest would actually be calculated at 6%.

We do not find evidence in the record which establishes fraud, malfeasance, or misrepresentation of a material fact in the execution of the stipulation. Contrary to petitioner's argument, we do not conclude that the term "minimum interest" clearly indicates that the rate of 6% interest per annum was ever agreed upon by petitioner and the Division. Rather, we agree with the Administrative Law Judge that the Division had no discretion to impose a rate of interest for the underpayment of tax other than pursuant to the applicable provisions of the Tax Law.

Subdivision twenty-sixth of section 171 of the Tax Law and Tax Law § 1096(e)(1), taken together, specify that the overpayment and underpayment rates of interest applicable to the petroleum business tax are based on the average prime rate charged by banks prior to the effective date of Chapter 61 of the Laws of 1989 and based on the Federal short-term rate

thereafter. However, those sections provide that such rates shall not be less than six percent per annum and if no rates are set, the rate shall be deemed to be set at six percent per annum. Thus, we agree with the Administrative Law Judge that "[t]he interest computed based on the underpayment rates established by the commissioner represents the minimum amount of interest due on petroleum business tax that has been determined due" (Determination, conclusion of law "G").

We find that our decision in ***Matter of Welco Ad Corp.*** (***supra***) is controlling as to the Commissioner's authority in matters involving interest. In ***Welco***, petitioner argued that it was entitled to an abatement of interest on an underpayment of sales and use tax imposed in excess of the 6% minimum rate of interest provided by Tax Law § 1142(2). That section authorized the Commissioner of Taxation to "remit penalties but not interest computed at the rate of six percent per annum" (Tax Law § 1142[2]). However, Tax Law § 1145(a)(1)(iii) provided that the portion of penalty interest in excess of interest computed at the underpayment rate may be abated if it was determined that the failure to pay sales and use tax was due to reasonable cause and not due to willful neglect. We held that: "[i]nterest was computed at the underpayment rate and there exists no statutory or regulatory authority to waive or abate interest computed at the underpayment rate" (***Matter of Welco Ad Corp.***, ***supra***). We held that the language used in Tax Law § 1142(2) "cannot be held to override or supercede the specific language contained in Tax Law § 1145(a)(1)(iii) which authorizes the abatement of interest only to the underpayment rate" (***Matter of Welco Ad Corp.***, ***supra***). In ***Welco***, unlike the present case, this Tribunal found that "petitioner was misled by both the Division and the Administrative Law Judge to the effect that the underpayment rate of interest was 6% per annum" (***Matter of Welco Ad Corp.***, ***supra***).

Despite this, we held that the Division's computation of interest charges using interest rates ranging from 14% to 6% was proper.

In the present case, petitioner has not demonstrated that the Division agreed to impose interest at a rate not exceeding 6% per annum nor any authority which would allow the Division to impose an underpayment rate of 6% of interest unless the Commissioner of Taxation and Finance either failed to set a rate of interest as required by Tax Law § 1096(e)(1) or the rate, as calculated pursuant to Tax Law § 1096(e)(2), fell below 6%. As a result, petitioner's argument that it is entitled to be charged interest on its underpayment of tax at a rate not exceeding 6% based on the terms of the stipulation for discontinuance must fail.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Barrier Oil Corporation is denied;

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

3. The motion of Barrier Oil Corporation to reopen this matter is denied.

DATED: Troy, New York
July 29, 1999

/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