STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FAIRLAWN DAIRIES, INC.	:	DECISION DTA NO. 817010
for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period April 1, 1990 through December 31, 1995.	:	

Petitioner Fairlawn Dairies, Inc., P.O. Box 3340, Wallington, New Jersey 07057-0340, filed an exception to the determination of the Administrative Law Judge issued on November 9, 2000. Petitioner appeared by McDermott, Will & Emery (Arthur R. Rosen, Esq. and Richard A. Leavy, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, 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 but relied, instead, on its brief filed below. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on June 21, 2001 in New York, New York.

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

ISSUE

Whether the Division of Taxation properly assessed Fairlawn Dairies, Inc. highway use taxes as a "carrier" or "owner" pursuant to the provisions of Article 21 of the Tax Law.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued four notices of determination to petitioner, Fairlawn Dairies, Inc., dated June 21, 1996. The first (Assessment ID L012262216) is an assessment of highway use tax pursuant to Tax Law Article 21, specifically for truck mileage tax, in the amount of $63,454.81, plus interest and penalty in the amounts of $7,320.23 and $14,899.50, respectively, totaling $85,674.54, for the period April 1, 1994 to December 31, 1995.

The second notice (Assessment ID L012262215) is an assessment of highway use tax pursuant to Tax Law Article 21, specifically for fuel use tax, in the amount of $43,258.24, plus interest and penalty in the amounts of $3,898.04 and $9,053.43, respectively, totaling $56,209.71, for the period October 1, 1994 to December 31, 1995.

The third notice (Assessment ID L012262214) is an assessment of highway use tax pursuant to Tax Law Article 21, specifically for fuel use tax, in the amount of $86,523.98, plus interest and penalty in the amounts of $34,599.35 and $25,920.64, respectively, totaling $147,043.97 for the period April 1, 1990 to September 30, 1994.

The fourth notice (Assessment ID L012262213) is an assessment of highway use tax pursuant to Tax Law Article 21, specifically for truck mileage tax, in the amount of $183,710.52, plus interest and penalty in the amounts of $80,238.65 and $55,108.43, respectively, totaling $319,057.60 for the period April 1, 1990 to March 31, 1994.

Petitioner timely filed its Article 21 tax returns, concerning truck mileage tax and fuel use tax, with respect to tractors owned by petitioner during the audit period and timely paid the

amounts indicated thereon. The Division asserts that petitioner has underreported and underpaid its Article 21 liability as a result of petitioner's being jointly and severally liable for the liability of the independent contractors either as a carrier with respect to the vehicular units consisting of the independent contractor's tractors and the semi-trailers owned by petitioner, or in the alternative, as the owner of semi-trailers employed by the owner-operators.

Petitioner and the Division have agreed that if it is ultimately determined that petitioner is responsible for the Article 21 liability of the independent contractors, the amount of additional liability under Article 21 arising from the operations of the independent contractors engaged by petitioner to deliver petitioner's products is $429,497.18. This additional liability arises exclusively from the operation of the independent contractors.

Petitioner and the Division have also agreed that petitioner overpaid its liability for Article 21 arising from the operation of tractors owned by petitioner during the audit period, in the amount of $140,723.00, due to a reporting error. If petitioner prevails in this matter, the parties agree that petitioner will be entitled to a refund in the amount of $140,723.00 plus applicable interest.

The net amount of additional liability sought by the Division from petitioner pursuant to Article 21, after crediting the overpayment of liability arising from the operation of tractors owned by petitioner, and crediting the payments made by the independent contractors, is $288,774.18. If the Division prevails in this matter, the parties agree that petitioner will be obligated to make an additional payment of Article 21 tax in the amount of $288,774.18 plus applicable interest. The Division has agreed to cancel any penalties imposed with respect to the additional liability sought by the Division from petitioner.

Petitioner was organized as a wholly-owned operating subsidiary of Farmland Dairies, Inc. and was engaged in the business of procuring, marketing and delivering milk and milk-related products. During the audit period, petitioner maintained its principal place of business in Wallington, New Jersey, where all of its production, distribution and office facilities were located. Petitioner sold its products to customers in New Jersey, New York, Pennsylvania and Connecticut; however, all of the company's deliveries originated at petitioner's Wallington, New Jersey facilities.

All of petitioner's customers in New York were retail stores that generally required deliveries by vendors such as Fairlawn to be made pursuant to specific scheduled delivery time windows. Such delivery time windows, set by petitioner's customers in New York, provided short periods of time, generally one to two hours, during which the store personnel would be available to receive deliveries. The time windows were generally before 11:59 A.M., and petitioner's New York customers would generally refuse deliveries when an appointed delivery time window was missed. The use of delivery time windows, however, allowed some flexibility in establishing the order in which deliveries were made.

Petitioner took customer orders each business day for delivery the next business day, and grouped and loaded customers' orders onto semi-trailers for delivery based upon the geographic area of the customers, the geographic area to which the semi-trailers were assigned, the capacity of the semi-trailers, and the delivery time windows requested by the customers. It was the responsibility of petitioner's dispatcher to supervise the loading of customer orders onto the semi-trailers, assign delivery locations to petitioner's (employee) drivers, and request that

deliveries be made by independent contractors pursuant to the contracts entered into with petitioner.

Petitioner tracked the groupings of customer orders for loading and delivery by the number assigned to the semi-trailers in which they were loaded and not by the tractors used to pull them. Petitioner generally began loading the semi-trailers used to transport customer orders at 11:00 P.M. and the first deliveries would depart at approximately 4:00 A.M. In general, between 7 and 20 customer orders would be loaded by petitioner onto a single semi-trailer for delivery to customers.

Petitioner's products were delivered to customers on semi-trailers owned by petitioner displaying the brand name of the products sold by Fairlawn (as opposed to "Fairlawn" or a variant thereof), either drawn by petitioner's tractors operated by petitioner's employees, or drawn by tractors owned and operated by independent contractors retained to make deliveries on behalf of petitioner. Each day, between 65 and 85 tractor and semi-trailer combinations were used to deliver petitioner's products. Approximately 80% of the deliveries to petitioner's customers were made by petitioner's employees with tractors and semi-trailers owned by petitioner. The remaining 20% of the deliveries were made by independent contractors with semi-trailers owned by petitioner and tractors owned by the independent contractors. Petitioner's dispatcher would customarily request that the independent contractors deliver to the same customers on a recurring basis. However, each driver employed by petitioner and each driver for an independent contractor had the right and the opportunity to determine the order in which the semi-trailer he or she was transporting would be loaded to reflect the driver's preferred delivery order and driving route.

The diesel fuel supply used to power the refrigeration units used to keep products fresh on petitioner's semi-trailers was separate and apart from the diesel fuel supply used to power the tractors pulling them. The fuel used to power the refrigeration units was supplied by petitioner for all of petitioner's semi-trailers and is not an element of the computation of Article 21 tax liability claimed by the Division.

The relationships between petitioner and the independent contractors engaged to deliver petitioner's products were governed in all respects by relevant laws and regulations and the terms of contracts entered into by petitioner and the independent contractors, the form of which was submitted as part of the record. The contracts entered into between petitioner and the independent contractors:

a. specified the terms and conditions upon which petitioner hired the independent contractors and the compensation to be paid to the independent contractors for making deliveries;

b. provided that neither the independent contractors nor the independent contractors' drivers were employees of petitioner, but rather would be treated as independent contractors for all purposes;

c. granted the independent contractors the option to accept or reject any delivery request by petitioner without recourse;

d. permitted the independent contractors to deliver products for companies other than petitioner;

e. did not grant petitioner any control or supervision over the driving of independent contractors or the independent contractors' drivers;

f. did not grant petitioner any authority over the number of hours worked or any of the conditions under which the independent contractors' drivers operated the independent contractors' tractors used to make deliveries for petitioner;

g. did not allow petitioner to select driving routes used by the independent contractors' drivers or the order in which deliveries were to be made;

h. did not make the independent contractors or the independent contractors' drivers accountable to petitioner with respect to the details of the driving routes that they used or the time spent working, driving or unloading;

i. bore delivery requirements which required that deliveries had to be made to the locations specified by petitioner within the time windows specified by the customers and that the refrigeration units on petitioner's semi-trailers were to be used;

j. provided that petitioner had the right, but not the obligation, to make emergency repairs on the independent contractors' tractors solely for the purposes of making such tractors safe and protecting petitioner's products and, in practice, such emergency repairs were undertaken very rarely;

k. provided that the independent contractors would make payment to petitioner for the cost of parts or labor with respect to emergency repairs made by petitioner to the independent contractors' tractors and, in practice, in the very rare instances that such emergency repairs were made, payment was always made to compensate petitioner for the cost of parts or labor with respect to such emergency repairs;

l. provided that the independent contractors were responsible for any damage or loss with respect to petitioner's semi-trailers or products and would secure $1,000,000.00 of liability

insurance to indemnify petitioner against such damage or loss, naming petitioner as an additional insured;

m. provided that petitioner would not provide or maintain the tractors or any of the equipment, tools, materials, or supplies of the independent contractors and petitioner did not provide or maintain such items;

n. provided that petitioner would not provide reimbursement of expenses incurred in the delivery of petitioner's products (except bridge, highway, and tunnel tolls) by the independent contractors and petitioner did not provide such reimbursement;

o. stated that petitioner would not provide the fuel used by the independent contractors to power their tractors in delivering petitioner's products and petitioner did not pay for such fuel;

p. provided that each independent contractor had the obligation to provide his, her or its own tractors over which the independent contractor retained "exclusive possession, control and use" and the independent contractors provided their tractors over which they retained "exclusive possession, control and use";

q. provided that each independent contractor was entitled to hire drivers and assistants at his, her or its own expense and the independent contractors exercised such rights;

r. provided that the drivers operating the tractors of the independent contractors' engaged by petitioner to deliver petitioner's products would not wear Fairlawn employee uniforms and such drivers did not wear Fairlawn employee uniforms;

s. provided that the independent contractors would not display the Fairlawn name on their tractors or on any of their equipment and the independent contractors did not so display the Fairlawn name;

t. provided that the independent contractors would deliver petitioner's products at a fixed rate plus highway, bridge, and tunnel tolls; and

u. provided that the independent contractors would have the responsibility for all environmental liabilities arising from the operation of their tractors.

Any profit or loss to the independent contractors under contracts entered into between petitioner and the independent contractors was a result of the independent contractors' own operating expenses and revenues.

Neither the independent contractors nor the independent contractors' drivers were employees of petitioner for purposes of all federal, state and local employment taxes, including, but not limited to, federal income tax withholding, state income tax withholding, Federal Insurance Contribution Act taxes, and Federal Unemployment Tax Act taxes, but rather were properly characterized as independent contractors and the employees of independent contractors. Accordingly, petitioner did not withhold any federal, state or local payroll or income taxes from the amounts paid to the independent contractors engaged by petitioner to deliver petitioner's products.

Petitioner did not provide any employee benefits or any workers' compensation coverage to either the independent contractors or employees of the independent contractors. The independent contractors each had the responsibility for filing tax returns and paying their own tax liabilities, including federal and state income taxes. Likewise, as both owners and operators with respect to the tractors they operated, the independent contractors each had the responsibility for paying all tax liabilities under Article 21 from the operation of their tractors (whether the

independent contractors' liability for the tax arising under Article 21 is exclusive is the question at issue in this proceeding).

As a courtesy, petitioner prepared the Article 21 returns for a limited number of the independent contractors; however, such returns were prepared in the names of the independent contractors with information provided by such independent contractors and the Article 21 liability reflected on those returns was paid by such independent contractors.

Petitioner was not an owner or lessee of the tractors operated by the independent contractors.

As both owners and operators with respect to the tractors they operated, the independent contractors each had the responsibility for complying with all motor vehicle and motor carrier safety statutes, ordinances, and regulations, including complying with all federal, state, and local laws and regulations governing the operation of their tractors.

Petitioner was not registered with the United States Interstate Commerce Commission ("ICC") and did not have an ICC number, since petitioner was not required to obtain such number. To the extent, however, that the independent contractors delivered petitioner's retail products or delivered goods for other companies, those independent contractors were required to be registered with the ICC. There was no exemption from the ICC requirements allowing single-driver independent contractors to operate under petitioner's exemption from registration with the ICC.

Petitioner was not required to be, nor was it, registered with the New York State Department of Transportation and it did not have a New York State Department of Transportation number.

Petitioner was registered with the New Jersey Department of Transportation ("NJDOT") and was in possession of a NJDOT number reflecting such registration. Accordingly, petitioner was responsible for complying with all rules and regulations promulgated by the NJDOT. NJDOT required that petitioner maintain logs and other records detailing all of the deliveries that were made by or on behalf of petitioner, and did not distinguish between deliveries made by petitioner's employees, with tractors owned by petitioner, and those made by independent contractors, with tractors owned by the independent contractors. The contracts entered into between petitioner and the independent contractors provided that the independent contractors would furnish petitioner with logs and other records on a daily basis so that petitioner itself could comply with the NJDOT rules requiring logs and other records, as the party on whose behalf deliveries were made.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that Article 21 imposes both highway use tax and fuel use tax on the carrier or the carrier and owner, jointly, if the carrier is not the owner of the vehicular unit (Tax Law §§ 503 and 503-a). The Administrative Law Judge cited the definitions of "carrier," "vehicular unit" and "motor vehicle" in order to categorize petitioner's semi-trailers for purposes of the imposition of the tax upon it.

The Administrative Law Judge rejected petitioner's argument that the 1984 amendment to Tax Law § 501's definition of "motor vehicle," which removed the reference to "drawn devices," had an impact on this matter. Indicating that there was no support for its position in the legislative history of the amendment, the Administrative Law Judge flatly asserted that the amendments did not change liability for tax under Article 21. The Administrative Law Judge

noted that the stated purpose of the amendment was to streamline administration and compliance by eliminating certain requirements relating to permits and stickers for semi-trailers and other drawn devices. The Administrative Law Judge pointed out that the sections of the Tax Law which imposed the highway use tax were unchanged by the 1984 amendments and that Tax Law §§ 501, 503 and 504 should be read together to formulate an accurate interpretation of the taxing scheme.

The Administrative Law Judge agreed with petitioner's position that it was not a "carrier" (Tax Law §501[5]) and that its semi-trailers were not "vehicular units" (Tax Law § 501[3]) or "motor vehicles" (Tax Law § 501[2]). However, the semi-trailers are considered "vehicular units" when drawn by a motor vehicle (Tax Law § 501[3]). The Administrative Law Judge conceded that the vehicular units were under the control of the independent contractors, but stopped short of exculpating petitioner from liability given the joint and several liability imposed by Tax Law §§ 503 and 503-a on the carrier and "owner" of the vehicular unit. The Administrative Law Judge reasoned that the tax was imposed on the vehicular unit comprised of the independent contractor's tractor and petitioner's semi-trailer and that petitioner was liable for the tax based upon the joint and severable liability provided for in Tax Law §§ 503(1) and 503-a(1).

ARGUMENTS ON EXCEPTION

While petitioner agrees with the Administrative Law Judge's conclusion that it is not liable for the Article 21 tax as a carrier, it does not believe that it is liable as an owner of the vehicular unit pursuant to Tax Law § 503(1). Petitioner reasons that since the independent operators own the motor vehicles and the tax is imposed on owners of vehicular units defined as motor vehicles

alone or in combination with semi-trailers, the tax is born entirely by the independent operators. Petitioner contends that the use of a motor vehicle in combination with a semi-trailer does not in any way affect the ownership of the motor vehicle or the vehicular unit, which it believes remains with the owner of the motor vehicle.

Petitioner analyzes the definition of "vehicular unit" as found in Tax Law § 501(3) on the basis of grammar; use of the term "in combination with" in other statutes; and deductive analysis. With respect to the section's grammar, petitioner believes the "in combination with" language is merely adjectival in nature and that it is only the motor vehicle which constitutes the vehicular unit. Petitioner cites several provisions in other statutes which it contends supports its interpretation of the "in combination with" language. In addition, petitioner maintains that the legislative intent supports its interpretation as well. It believes that the 1984 amendment to Tax Law § 509(9) conferred the additional power to the State Tax Commission to audit "any person" necessary to gain compliance with Article 21. Petitioner interprets this new provision as an acknowledgment that owners of drawn devices did not have Article 21 liability. Petitioner concludes that the amendment indicated an intent to exempt the owners of drawn devices from Article 21 tax. Finally, petitioner argues that even if its exemption from liability was not clear, statutes which impose tax liability must be construed most strongly in favor of a taxpayer, which requires adoption of its interpretation.

The Division relies on its arguments made to the Administrative Law Judge. It is worth noting that the Division continues to argue that the amendments to Article 21 in 1984 did not affect the imposition of tax under Article 21 or the concept of a vehicular unit. It believes that

State Tax Commission cases which found semi-trailers to be vehicular units and their owners to be liable for Article 21 tax remained unchanged by the amendments.

OPINION

The only issue remaining for disposition is whether the ownership of the semi-trailers by petitioner entails tax liability under Article 21 of the Tax Law. The law in effect during the audit period imposed highway use tax on carriers, and, where the carriers were not the owners of the vehicular units, the tax was a joint and several liability upon both the carrier and the owner (Tax Law § 503[1]). While the issue of petitioner as "carrier" is not before us, there remains a dispute as to petitioner's status as the owner of the vehicular unit.

Tax Law § 501(3) provides:

> "Vehicular Unit" shall mean a motor vehicle alone or in combination with any other motor vehicle, trailer, semi-trailer, dolly, or other device drawn thereby.

Unfortunately, the statute does not delve into the issue of ownership. However, notwithstanding petitioner's construction to the contrary, we do not agree that the owner of the motor vehicle is the sole owner of the vehicular unit when that unit is composed of a tractor owned by one entity and a semi-trailer owned by another entity. Petitioner's ownership of the semi-trailers made it a co-owner of the vehicular unit and liable for the tax imposed by Tax Law §§ 503 and 503-a.

Petitioner's argument that use of a motor vehicle in combination with a semi-trailer does not affect the ownership of the vehicular unit is not persuasive. The statutory definition of vehicular unit does not provide that adding a semi-trailer to a motor vehicle merely creates a larger motor vehicle (just an "adjectival" modification), as if the addition of a trailer has no impact on the vehicular unit. It says that a vehicular unit can be a motor vehicle alone or a motor

vehicle in conjunction with several possible attachments. It does not prohibit multiple owners, nor would such a prohibition be practical or prudent. Certainly, the independent operators did not have the right to sell petitioner's semi-trailers nor would they ever make such a claim of right. Therefore, a reading of the plain language of Tax Law §§ 501, 503 and 503-a leads us to the conclusion that petitioner, as co-owner of the vehicular unit, had a joint and several liability for the tax with the owner of the tractor.

Petitioner would have us ignore the decisions of the State Tax Commission in ***Matter of Farrell Lines*** (TSB-H-80[2]M), ***Matter of XLT Service*** (TSB-H-81[13]M) and ***Matter of ARD Rental Corp.*** (TSB-H-84[24]M) because the reasoning employed in those decisions applies the former definitions of "motor vehicle" and "vehicular unit," which it argues are no longer relevant.[1] In those cases, the owners of the trailers were jointly and severally liable for highway use, fuel use and truck mileage taxes with the tractor owners. Trailer owners were determined to be owners of vehicular units.

Prior to the amendments to the definitions in Tax Law § 501 (L 1984, ch 583), the definition of motor vehicle included a tractor in combination with a semi-trailer (Tax Law former § 501[2]). Reference to the semi-trailer was deleted from that definition and added to the definition of vehicular unit (Tax Law § 501[3]).

In the summary of provisions of the Memorandum in Support, the bill's sponsor, Senator Dale M. Volker, noted:

> Bill section 2 amends the definition of "vehicular unit" so it includes a . . . semi-trailer . . .; *thus, the current statutory concept*

[1]We note that State Tax Commission decisions are not binding on this Tribunal, but they are deserving of respectful consideration (***Matter of Racal Corp.***, Tax Appeals Tribunal, May 13, 1993).

> *of a "vehicular unit" is continued* (Memorandum in Support, Dale M. Volker, Senate Bill 9877, June 18, 1984, emphasis added).

Read in conjunction with the State Tax Commission cases cited above, knowledge of which is imputed to the Legislature at the time of the amendment, it is clear that the Legislature did not mean to disturb the State Tax Commission's decisions with a new "concept" of vehicular unit. Certainly, the Legislature had the power and opportunity to make such a change at that time had it desired to do so. "It is a sound inference that, in the absence of express language indicating its intention, it is presumed that the Legislature did not intend to overturn long established rules of law" (McKinney's Statutes, § 74).

The amendment to Tax Law § 509 conveyed the power to require owners of semi-trailers to keep books and records to enable the Division to audit liability for the tax imposed under Article 21. Petitioner argues that since the State Tax Commission already had the authority to audit persons with liability under Article 21, the reference to a new power to audit necessarily referred to persons without Article 21 tax liability who were viewed as necessary to compute the tax liability of others, i.e., the owners of semi-trailers. In fact, petitioner contends that this legislative change indicates the Legislature's intent to create an implied exemption for the owners of semi-trailers from Article 21 tax. We do not agree. Tax Law § 504 specifically sets forth exemptions to the provisions of Article 21. There is no mention of an exemption for semi-trailers or their owners. Since part of Tax Law § 504 was amended as part of the 1984 legislation, the Legislature's failure to add an exemption for trailers indicated it did not intend to provide one (McKinney's Statutes, § 74). As a general rule, statutory exemptions from tax are strictly construed against the party claiming the exemption. The burden is upon petitioner to

clearly establish its right to the exemption provided (***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027). Here, petitioner has not established the existence of an exemption, let alone its right to it. Failing the establishment of an exemption and its entitlement thereto, petitioner maintains that the doubts over the scope and application of Tax Law §§ 503(1), 503-a(1) and 508 must be narrowly construed and resolved in its favor (***Debevoise & Plimpton v. New York State Dep't of Taxation & Fin.***, 80 NY2d 657, 593 NYS2d 974). However, we believe that the Division's imposition of tax in this instance was specifically contemplated by the statute in clear terms, supported by State Tax Commission decisions and legislative history.

The reason for the modification of Tax Law § 509 was part of the entire scheme to eliminate the use of permits and stickers on trailers, semi-trailers and other drawn devices. The change in the permitting system was accomplished by changes in the definition of such terms as "motor vehicle," "vehicular unit" and "carrier." As Senator Volker mentioned, the statutory concept of a "vehicular unit" and the State Tax Commission's determination that the owner of semi-trailers could be jointly and severally liable for Article 21 taxes were not disturbed by the 1984 amendments to Article 21.

In summary, it is determined that petitioner is liable for the taxes at issue because of its status as an owner of the semi-trailers which, of necessity, makes it a co-owner of the vehicular unit and jointly and severally liable for the taxes incurred by those units (Tax Law §§ 503[1] and 503-a[1]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Fairlawn Dairies, Inc. is denied;

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

3. The petition of Fairlawn Dairies, Inc. is denied; and

4. The four notices of determination, dated June 21, 1996, are modified in accordance with the conclusion of law "E" of the Administrative Law Judge's determination, but in all other respects are sustained.

DATED: Troy, New York
December 20, 2001

/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