STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FINCH, PRUYN & CO., INC.	:	DECISION DTA NO. 817024
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9 of the Tax Law for the Period June 1, 1993 through May 31, 1997.	:	

Petitioner Finch, Pruyn & Co., Inc., One Glen Street, Glens Falls, New York 12801, filed an exception to the determination of the Administrative Law Judge issued on June 24, 2003. Petitioner appeared by McNamee, Lochner, Titus & Williams, P. C. (Robert D. Plattner, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Kathleen D. O'Connell, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to determine whether the gas import tax is unconstitutional on its face.

II. Whether the gas import tax violates the Commerce Clause and Due Process Clause of the United States Constitution.

FINDINGS OF FACT

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

During the period in issue, June 1, 1993 through May 31, 1997, petitioner, Finch, Pruyn & Co., Inc. ("Finch, Pruyn"), was a New York corporation which operated a manufacturing facility in Glen Falls, New York. Its corporate headquarters were also located in Glens Falls, New York.

Petitioner purchased natural gas outside the State of New York that was brought into New York through an interstate pipeline. The gas was delivered to petitioner and consumed by petitioner at its facility in Glens Falls.

Following a field audit, on January 13, 1997, petitioner paid the Division of Taxation ("Division") $212,201.19 as payment in full for the taxes, penalty and interest asserted to be due by the Division under Tax Law §§ 189 and 189-b for the period June 1, 1993 through November 30, 1996. Petitioner paid the Division taxes pursuant to Tax Law §§ 189 and 189-b for the period December 1, 1996 through February 28, 1997 in the amount of $2,242.20 and petitioner paid the Division taxes pursuant to the same sections of the Tax Law for the period March 1, 1997 through May 31, 1997 in the amount of $19,369.20.

On September 11, 1997, petitioner filed a Claim for Refund of Section 189 and Tax Surcharges in the amount of $233,813.08 for the period June 1, 1993 through May 31, 1997. The refund claim stated that Tax Law § 189 violated the Commerce Clause of the Federal Constitution.

The Division has held petitioner's refund claim in abeyance pending the resolution of court cases seeking to have Tax Law § 189 declared unconstitutional.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began by placing the issues presented here in their historical context. In 1978, Congress passed the Natural Gas Policy Act (15 USC § 3301, *et seq.*) which precipitated the deregulation of the natural gas industry.[1] At the time this Act was passed, interstate pipeline companies controlled prices in New York because they controlled the method for distribution of gas from the wellhead to the regulated utilities. In 1992, the pipelines became common carriers of natural gas by order of the Federal Energy Regulatory Commission ("FERC"), which directed all interstate pipelines to "unbundle" their transportation services from their gas sales. As a result, large industrial buyers could circumvent local utilities and purchase natural gas directly from suppliers. The gas is delivered by a New York Gas utility or by pipeline. In accordance with FERC-approved tariffs, the cost which the user pays for transporting the gas is separate from the purchase price of the gas.

New York's system of taxing natural gas, the Administrative Law Judge explained, was developed prior to the deregulation of the natural gas industry, and was focused upon the entities which sold gas in New York. The Administrative Law Judge noted that although the taxes may not be identified on a customer's bill, they are passed through to the gas utilities' customers pursuant to a Public Service Commission tariff. As a result of the deregulation of the natural gas industry, some customers were able to avoid the pass-through taxes by purchasing gas from out-of-State producers.

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[1]The history of the deregulation of the natural gas industry is explained in ***General Motors Corp. v. Tracy*** (519 US 278, 136 L Ed 2d 761) and ***Tennessee Gas Pipeline Co. v. Urbach*** (96 NY2d 124, 726 NYS2d 350). The history set forth above was obtained largely from ***Tennessee Gas***.

The Administrative Law Judge explained that in order to recover the taxes which were, thus, being avoided and to equalize the tax burden on all gas consumers in the State, the New York Legislature enacted the Natural Gas Import Tax ("gas import tax") (L 1991, ch 166, §§ 147-149) which imposes tax "on the privilege or act of importing gas services or causing gas services to be imported into this state for its own use or consumption in this state" (Tax Law § 189[2][a]). During the years in issue, the tax was imposed at a rate of 4.25 percent of the consideration given or contracted to be given by the gas importer for the gas imported into this State for its own use or consumption (Tax Law § 189[2]).

Initially, the Administrative Law Judge noted, petitioner challenged the denial of its refund claim in an Article 78 proceeding, arguing that the gas import tax was unconstitutional on its face. The Supreme Court, Albany County, dismissed the petition as premature, without prejudice to petitioner exhausting its administrative remedies (***Finch, Pruyn & Co. v. Urbach***, Sup Ct, Albany County, March 9, 1999). This proceeding followed. The Administrative Law Judge pointed out that in the earlier case, the Supreme Court, Albany County, had also dismissed a constitutional challenge to the gas import tax raised by Tennessee Gas. Tennessee Gas appealed the dismissal to the Appellate Division which found no merit to a facial challenge to the statute. Further, it agreed with the lower court that Tennessee Gas's challenge was aimed at the statute as applied and directed Tennessee Gas to pursue its administrative remedies (***Tennessee Gas Pipeline Co. v. Urbach***, 269 AD2d 19, 708 NYS2d 193, ***revd on other grounds*** 96 NY2d 194, 726 NYS2d 350). Tennessee Gas pursued its claim to the Court of Appeals, which reversed the Appellate Division and found the statute unconstitutional on its face (***Tennessee Gas Pipeline Co. v. Urbach***, ***supra***).

The Court of Appeals determined that the gas import tax discriminated against interstate commerce because it imposed a tax on out-of-State purchases of gas consumed in New York while not imposing a tax on in-State purchases of gas in New York (***Tennessee Gas Pipeline Co. v. Urbach***, ***supra***). The Court then proceeded to examine the Division's argument that the gas import tax could withstand a Commerce Clause challenge because the tax complemented the taxes imposed by Tax Law §§ 186 and 186-a and concluded that Tax Law § 186 violated the internal consistency test because if consumers purchased gas in a State with a provision identical to Tax Law § 186, they would pay a pass-through tax despite the fact that the gas was exported to and consumed in New York. Thus, a double tax occurs because the import tax contains no provision for a credit for taxes imposed on the out-of-State purchase of gas. The Legislature included a savings clause which provided that if a court of competent jurisdiction should find the statute invalid because of lack of an appropriate credit for tax imposed by another jurisdiction, then such credit, to the extent of the tax imposed, shall be deemed available in the manner provided by the Court.

However, the Administrative Law Judge noted that the Court viewed this saving clause as invalid, since it would require the Court to define the parameters of the credit, which it deemed a legislative function. The Court declared Tax Law §§ 189, 189-a and 189-b unconstitutional as violative of the Commerce Clause of the United States Constitution, reversing the Appellate Division. In response to the Court's decision in ***Tennessee Gas***, the New York Legislature enacted Chapter 383 of the Laws of 2001 amending the gas import tax and establishing a retroactive tax credit for taxpayers who paid in another jurisdiction a tax similar to that imposed by Tax Law § 186.

In the matter herein, the Administrative Law Judge noted that petitioner, in its presentation to the Supreme Court, Albany County, and the Division, in its argument to the Division of Tax Appeals, have each pointed out that the challenge to the gas import tax is based on questioning the constitutionality of the law on its face.[2] The Administrative Law Judge held that the Division of Tax Appeals does not have jurisdiction to determine the constitutionality of a statute on its face (***see***, ***Matter of J.C. Penney Co.***, Tax Appeals Tribunal, April 27, 1989). The Administrative Law Judge pointed out that the arguments raised by petitioner are facial challenges to the statute. The decision of the Court of Appeals in ***Tennessee Gas*** treated the same arguments as legal issues not warranting an administrative hearing. The Administrative Law Judge concluded that each of petitioner's argument, i.e., that the gas import tax is invalid *per se* because it discriminates on its face against interstate commerce in violation of the Commerce Clause; that the gas import tax does not meet the requirements of a valid compensatory tax; that the retroactive credit provision does not cure the gas import tax's constitutional infirmity as an invalid compensatory tax; and that the 2001 amendments to the gas import tax which apply retroactively to 1991 and thereafter, violate petitioner's due process in regard to its refund claim contest the validity of the statute on its face and, as such, may not be considered by the Division of Tax Appeals. Thereupon, the Administrative Law Judge denied the petition.

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[2]The Administrative Law Judge noted that whle the parties may not, by agreement, confer or diminish the jurisdiction of the Division of Tax Appeals, petitioner's reply brief did not challenge the Division's argument that the Division of Tax Appeals did not have jurisdiction.

ARGUMENTS ON EXCEPTION

Petitioner has taken exception to the rejection by the Administrative Law Judge of its proposed findings of fact. Petitioner had requested findings of fact regarding the annual volume of gas sold by unregulated marketers to New York purchasers, the percentage of volume of such sales compared to all sales of natural gas to New York purchasers, and the failure of the Division to offer evidence of volumes of natural gas sold in New York.

Petitioner has not taken exception to any of the conclusions of law of the Administrative Law Judge.

Nonetheless, petitioner's brief on exception makes the same arguments as were offered below. Petitioner argues that Tax Law §§ 189, 189-a, and 189-b (collectively referred to as § 189 or the gas import tax) imposed on petitioner on its use in New York of natural gas it imports from out of state: i) discriminates on its face against interstate commerce in violation of the Commerce Clause of the United States Constitution and is invalid *per se*; and ii) is not a valid compensatory tax. Further, petitioner urges that iii) the retroactive credit provision added to the gas import tax by Chapter 383 of the Laws of 2001 does not cure its constitutional infirmities as a valid compensatory tax, and iv) the credit provision enacted in 2001, retroactive to 1991, violates petitioner's constitutional due process rights.

In response to the foregoing, the Division argues that the Division of Tax Appeals lacks jurisdiction to determine the constitutionality of a statute on its face which is the sole challenge raised by petitioner. It also argues that the doctrine of *stare decisis* requires that the ***Tennessee Gas*** decision be followed. Lastly, the Division contends that the gas import tax has been held to be a valid compensatory tax which does not discriminate against interstate commerce.

OPINION

We begin by addressing petitioner's proposed findings of fact. We agree that all three proposed facts were properly rejected by the Administrative Law Judge.

The first proposed finding of fact was rejected because the statement is irrelevant. As pointed out by the Division, the relevant inquiry centers on the significance of the level of sales within the State in which consumers might have avoided taxation under Tax Law §§ 186 and 186-a because unregulated marketers were not required to pass through such tax to the ultimate consumer.

We agree that proposed finding of fact two was properly rejected. On the premise that transportation sales volumes as set forth in the statistical tables published by the Public Service Commission ("PSC") constitute volumes of gas sold by unregulated marketers, petitioner compared total transportation sales volumes for the year to total sales volumes and stated that the result was the percentage of all gas used in New York State arising from sales by unregulated marketers. The PSC does not have information that establishes what portion of the transportation sales volumes involved sales in which title to the gas passed within New York. As a result, volumes of gas imported into New York which are taxable under Tax Law § 189 are included in the transportation sales volume figures. Consequently, the computations do not show what percentage of section 186 sales skirts the compensatory tax scheme because such sales are made by unregulated marketers who are not required to pass the Tax Law § 186 tax on to their customers.

It is noted that when the Court of Appeals rejected similar arguments with respect to unregulated marketers, it cited the same publications of the Public Service Commission which

are relied upon by petitioner to support this finding of fact (***Tennessee Gas Pipeline Co. v. Urbach***, ***supra***, 726 NYS2d 350, 355, n. 6).

Lastly, petitioner's third proposed finding of fact was properly rejected by the Administrative Law Judge because the proposition constituted an improper attempt to shift the burden of proof to the Division (State Administrative Procedure Act § 306[1]).

Next, we turn our attention to the legal issues presented.

Although its amended petition makes reference, in passing, to the statute being unconstitutional as applied to it, none of petitioner's evidence or arguments here, or below, advance that claim, i.e., there is no evidence or argument that the statute treats petitioner in a manner different from any similarly situated taxpayer. Moreover, petitioner has failed to demonstrate in this record how the 2001 enactment of the credit provision to the gas import tax deprived it of its due process rights.

Petitioner argues in its brief, as it did below, that the gas import tax is unconstitutional on its face. However, each of the arguments offered here by petitioner, with one exception, were considered by the Court of Appeals in ***Tennessee Gas Pipeline Co. v. Urbach*** (***supra***).[3] As was noted by the Division, the Court, in that case, not only analyzed the same tax statute at issue here, but addressed the precise arguments raised by petitioner. The only instance wherein the Court of Appeals found the gas import tax deficient was its failure, at that time, to provide a tax credit for taxes paid to other jurisdictions. That infirmity has been remedied by the Legislature by the addition of the retroactive tax credit.

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[3]The one exception to this is petitioner's claim that the credit provision added by the Legislature in response to the Court's decision in ***Tennessee Gas*** is facially invalid, fails to cure the flaws as a valid compensatory tax and denies petitioner due process by attempting to grant a tax credit retroactively.

We affirm the determination of the Administrative Law Judge. Petitioner failed to take exception to any of the Administrative Law Judge's conclusions of law. However, even if it had done so, we are without jurisdiction to grant the relief petitioner seeks. As we stated in ***Matter of Eisenstein*** (Tax Appeals Tribunal, March 27, 2003):

> The Division of Tax Appeals is a forum of limited jurisdiction and is not authorized to determine the facial constitutionality of statutes (***Matter of J.C. Penney Co.***, Tax Appeals Tribunal, April 27, 1989; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988).

The arguments that the gas import tax is constitutionally invalid on its face because it discriminates against interstate commerce in violation of the Commerce Clause is not a matter for decision within the purview of the Tax Appeals Tribunal and the Division of Tax Appeals.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Finch, Pruyn & Co., Inc. is denied;

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

3. The amended petition of Finch, Pruyn & Co., Inc. is denied.

DATED: Troy, New York
April 22, 2004

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

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