STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BROOKLYN UNION GAS COMPANY	:	DECISION DTA NO. 817453
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period August 1, 1993 through November 30, 1997.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 9, 2001 with respect to the petition of Brooklyn Union Gas Company, One Metrotech Center, Brooklyn, New York 11201. Petitioner appeared by Roberts and Holland, LLP (Carolyn Joy Lee, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception, petitioner filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on April 10, 2002 in Troy, New York.

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

ISSUE

Whether natural gas imported into New York by petitioner and used as fuel in its own motor vehicles was subject to the compensating use tax.

FINDINGS OF FACT

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

Petitioner, Brooklyn Union Gas Company, is an investor-owned, regulated public utility incorporated in New York State. Petitioner sells natural gas and the service of furnishing natural gas to customers in the boroughs of Brooklyn, Staten Island and part of Queens.

During the assessment period, petitioner purchased large quantities of natural gas from suppliers located outside New York State. It took title to the natural gas outside of New York and imported the natural gas into New York.

When it is brought into New York, the natural gas imported by petitioner is pressurized at a rate of approximately 300 pounds per square inch ("psi"). The pressure is gradually reduced at regulator stations operated by petitioner, and it enters people's homes at less than one psi.

The bulk of the natural gas imported by petitioner is sold to residential and commercial customers for use as a fuel for boilers, water heaters, stoves and other appliances that run on natural gas. A small portion of the natural gas imported by petitioner is used by petitioner to heat its own plants and offices and to fuel its own water heaters and other appliances.

Less than one percent of the natural gas imported by petitioner is sold to customers for use in natural gas vehicles. Customers operating natural gas vehicles in the New York City area include the New York City Transportation Authority, the State of New York, United Parcel Service ("UPS") and the operator of a fleet of taxicabs. All of petitioner's own motor vehicles are fueled by natural gas.

Petitioner operates several fueling stations where natural gas is compressed to approximately 3,000 psi and pumped directly into fuel storage cylinders installed in the motor vehicle. The purpose of compressing natural gas is to allow the vehicle to carry a sufficient amount of natural gas to travel for extended distances. Without pressurization, a natural gas vehicle would have little ability to travel at all. When natural gas is pressurized for the purpose of using it as fuel in a natural gas vehicle, it is commonly referred to as CNG (compressed natural gas). As the name implies, CNG is gas; that is, the compression of the gas does not change its composition or its essential nature as a gas. The CNG is decompressed and mixed with oxygen before it is injected into the engine's combustion chamber. The natural gas is burned in the combustion chamber at pressures equal to, or slightly higher than, normal atmospheric pressure. Increased storage is the only purpose served by compressing the natural gas.

Some of petitioner's CNG customers fill the tanks of their vehicles at petitioner's fueling stations. Others, such as UPS, own their own compression equipment and are able to fuel their natural gas vehicles at their own facilities. Natural gas, whether sold at petitioner's fuel stations or pumped at a customer's own facility, is measured at low pressure as it flows through meters. Meters measure natural gas in centimeters per cubic foot. The gas is then compressed and pumped into the fuel tanks of the natural gas vehicle. Petitioner sold compression equipment to those customers who wished to compress and pump the natural gas at their own facilities.

In 1987, petitioner filed an Application for Motor Fuel Tax and Sales and Use Tax Registration stating that it was in the business of manufacturing compressed natural gas to fuel CNG test vehicles. Petitioner is registered as a distributor of motor fuel. However, it does not

prepay the tax imposed on motor fuel at the time of first import of natural gas into New York, since the amount of natural gas that is imported for use in natural gas vehicles is unknown until the natural gas is actually pumped into the vehicle. Petitioner collects and remits sales tax on natural gas sold to its CNG customers.

Petitioner maintains a service center in Canarsie, in Brooklyn, New York. Natural gas entering the Canarsie facility is used to heat petitioner's own buildings. In addition, a small amount of natural gas is used to fuel petitioner's own fleet of natural gas vehicles. The same meters measure both the natural gas used to heat the facility and the natural gas used to fuel vehicles.

In October 1995, the Division of Taxation ("Division") conducted a combined motor fuel and sales tax audit of petitioner's books and records for the period January 1, 1993 through December 31, 1995. The audit period was later extended through November 30, 1997. As a result of this audit, the Division determined that petitioner correctly calculated and remitted sales tax on its sales of CNG to other parties. However, the Division determined that petitioner had not remitted use tax on its use of CNG in its own motor vehicles. On audit, petitioner claimed that its self-use of CNG was not subject to the use tax provisions of Tax Law § 1110. The Division took the position that natural gas, when it is compressed for use in a motor vehicle, becomes motor fuel, and as motor fuel, CNG is subject to the use tax provisions.

The Division calculated the use tax based upon petitioner's own records using a formula to convert the amount of gas used from centimeters per cubic inch, as measured by petitioner's meters, to gallons. As a result of this audit, the Division issued to petitioner a Notice of

Determination, dated June 22, 1998, assessing use taxes due for the period September 1, 1994 through November 30, 1997 of $85,352.07 plus interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that, during the period in issue, the Tax Law did not impose a use tax on the self-use of natural gas by a person importing it into the State.[1] The use tax was imposed on the use of *tangible personal property*, however acquired, and not acquired for resale. In turn, Tax Law § 1101(b)(6) defined tangible personal property as corporeal personal property of any nature, but not gas.

In her plain reading of the statute, the Administrative Law Judge concluded that the clear meaning of Tax Law § 1101(b)(6) was that gas is tangible personal property for purposes of Tax Law § 1105(b), but not for purposes of Tax Law § 1105(a) or Tax Law § 1110. The Administrative Law Judge also concluded that since Tax Law § 1110 does not reference the tax on gas or gas services imposed by Tax Law § 1105(b), that section also does not impose tax on the use of gas or gas service. The Administrative Law Judge noted that the Tax Appeals Tribunal recited this analysis in ***Matter of Penn York Energy Corp.*** (Tax Appeals Tribunal, October 1, 1992) where it decided that the compensating use tax did not apply to natural gas used by that petitioner in its operations.

The Administrative Law Judge found further support for her conclusion in the fact that the 2000 amendment to Tax Law § 1110 (effective May 15, 2000, L 2000, ch 63, § 24-a) imposed a tax where one had not been imposed previously; i.e., the section now imposes a use tax on gas and gas services.

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[1]The Administrative Law Judge noted that section 1110(a) of the Tax Law was amended in 2000 to include the use of gas or electricity described in Tax Law § 1105(b).

The Division argued that by virtue of Tax Law § 1102, which imposes a tax on motor fuel sold in the State and purchased outside the State and used in-state, the scope of Tax Law § 1110 was expanded to include any compound used as a motor fuel, including natural gas. The Administrative Law Judge rejected the argument, stating that the plain language of Tax Law § 1102 did not impose a new tax on motor fuel or broaden the scope of the compensating use tax. The Division has abandoned this argument on exception.

Finally, the Division contended that the regulation at 20 NYCRR 527.2(b)(3), which provides that the sales of gas in containers or cylinders with a capacity of less than one hundred pounds are sales of tangible personal property subject to tax under Tax Law § 1105(a), clearly demonstrates that petitioner's use of gas in its vehicles is taxable. The Administrative Law Judge disagreed, stating that the Division misinterpreted the regulation. The Administrative Law Judge believed that the regulation described a mixed transaction made up of a sale of tangible personal property (the cylinders) and the gas or gas service. The former is taxable pursuant to Tax Law § 1105(a) and the latter is taxable pursuant to Tax Law § 1105(b). The Administrative Law Judge noted that the facts did not establish that petitioner sold gas in cylinders and more importantly, gas was not taxable as tangible personal property for purposes of Tax Law § 1110.

ARGUMENT ON EXCEPTION

On exception, the Division seeks imposition of tax on petitioner's use of its natural gas on the sole basis of the regulation at 20 NYCRR 527.2(b)(3). The Division rejected the Administrative Law Judge's analysis of the regulation and the distinction between the sale of gas or gas service and the sale of cylinders or containers, contending that the sale of gas which is pumped into a customer's container with a capacity less than 100 pounds is the sale of tangible

personal property for purposes of the regulation. Therefore, argues the Division, it is taxable pursuant to Tax Law §§ 1105(a) and 1110.

OPINION

We affirm the determination of the Administrative Law Judge. During the audit period, Tax Law § 1110(a) specifically did not impose a use tax on gas. That provision was added to the statute in 2000. Tax Law § 1110(a) did impose a use tax on tangible personal property, but gas was specifically excluded from the definition of tangible personal property found in Tax Law § 1101(b)(6).

In an attempt to convince us that this was not a clear provision of the statutes, the Division argues that the regulation at 20 NYCRR 527.2(b)(3), promulgated pursuant to Tax Law § 1105(b) in 1988, directs the reader to ignore all the statutory sections mentioned above and to treat the sale of gas as a sale of tangible personal property. The regulation states:

> Sales of gas in containers or cylinders having a capacity of less than one hundred pounds of gas are considered to be sales of tangible personal property subject to tax under subdivision (a) of section 1105 of the Tax Law and not the sale of gas service or gas for the purposes of this section (20 NYCRR 527.2[b][3]).

The Administrative Law Judge concluded and we agree that petitioner is not selling gas in containers or cylinders. Such a sale is subject to tax as a sale of tangible personal property under Tax Law § 1105(a). The language of the regulation does not speak to the facts of this case and we are not disposed to confuse its plain meaning.

The Division's argument hinges on Example "3" of 20 NYCRR 527.2(b)(3) which identifies specific sales of LP gas in twenty pound cylinders by dealers for use on trailers and by plumbers, and refills of the same cylinders, as sales of tangible personal property. The Division

urges us to adopt its interpretation of this example, i.e., that it describes petitioner's self-use of the gas in issue. It reasons that if we do so, the gas must be considered tangible personal property and within the scope of Tax Law § 1110. We cannot agree.

We interpret Example "3" as a sale of tangible personal property in the form of refillable LP cylinders which are sold to specific customers for specific purposes and that the sale of the container or cylinder is an integral part of the described transactions, regardless of whether it is the first or fifth sale. The example equates the original sale of the cylinder of gas with sales of refills of the same cylinders and deems the receipts from both types of sales as receipts from the sale of tangible personal property. Our interpretation is consistent with the pertinent statutory provisions cited above and the language of 20 NYCRR 527.2(b)(3), further supporting our conclusion that petitioner's pumping of natural gas directly into the fuel tanks of its natural gas vehicles was not subject to use tax. As noted by the Administrative Law Judge, the gas flowed through petitioner's pipelines and meters directly into the fuel tanks of the motor vehicles. As such, it was not the sale of tangible personal property and was not taxable pursuant to Tax Law § 1110(a) during the period in issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition of Brooklyn Union Gas Company is granted; and

4. The Notice of Determination, dated June 22, 1998, is canceled.

DATED: Troy, New York
October 10, 2002

/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