STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :

of :

RILUC CO., INC. : DETERMINATION

for Revision of a Determination or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period February 1983 through December 1983. : :

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Petitioner, Riluc Co., Inc., 30 North Pollard Drive, Fulton, New York 13069, filed a petition for revision of a determination or for refund of highway use tax under Article 21 of the Tax Law for the period February 1983 through December 1983 (File No. 802892).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York, on October 21, 1987 at 2:45 P.M., with all briefs to be filed by February 19, 1988. Petitioner appeared by Lane, Johnstone, Sheldon & Neild, P.C. (William J. Neild, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

## ISSUES

I. Whether the Audit Division properly concluded that petitioner failed to pay tax on its purchases from a particular distributor because the sales invoices from that distributor did not separately state the amount of tax paid.

II. Whether the assessment of fuel use tax constitutes selective prosecution.

III. Whether 20 NYCRR 493.3(b) is inapplicable since it was promulgated pursuant to Tax Law § 503-a(3).

IV. Whether 20 NYCRR 420.9 and 493.3(b) are void for vagueness and whether 20 NYCRR 493.3(b) violates due process of law.

## FINDINGS OF FACT

1. During the period in issue petitioner, Riluc Co., Inc., operated six diesel trucks, one diesel tractor and one trailer which were used to haul items such as stone, gravel and blacktop.

2. Petitioner filed combined truck mileage and fuel use tax returns during the period in issue. On these returns, petitioner declined to complete the fuel use tax section of the returns presumably on the basis that petitionerpurchased and used its fuel in New York State and was therefore entitled to a fuel use tax credit.

3. In the course of a field audit of petitioner's records, the Audit Division found that one of

petitioner's suppliers of motor fuel, O. R. Hill Fuel ("Hill"), was an unregistered vendor. The Audit Division concluded that petitioner was unable to substantiate that it had paid motor fuel and sales taxes on its purchases of diesel fuel from Hill during the period in issue. As a result, the Audit Division issued an assessment of motor fuel tax under Article 12-A of the Tax Law. Subsequently, the Audit Division concluded that the tax should have been assessed pursuant to Article 21 of the Tax Law (which imposes tax on carriers) and, as a result, it cancelled the assessment under Article 12-A of the Tax Law.

4. On October 18, 1985, the Audit Division issued an Assessment of Unpaid Fuel Use Tax to petitioner whereby the Audit Division assessed a deficiency of fuel use tax in the amount of $11,910.17, plus penalty of $595.51 and interest of $3,049.96, for a total of $15,555.64. As was the case with the prior assessment, the basis for this assessment was the Audit Division's position that petitioner was unable to substantiate that taxes were paid on its purchases of diesel motor fuel from Hill. Consequently, the Audit Division disallowed the credit for taxes paid on fuel purchases made in New York.

5. During the period in issue, petitioner maintained an arrangement with Hill whereby at either the beginning or end of the day Hill would send a fuel truck to petitioner's garage and furnish petitioner's trucks with fuel. It was Hill's practice to leave a slip of paper stating the gallons provided at the time of the delivery. On a monthly basis, Hill sent petitioner a bill for the gasoline delivered.

6. The monthly bill from Hill reflected the date of delivery, the number of gallons delivered and the amount charged for the delivery that particular day. The invoice concluded with the phrase "[a]ll purchases include all taxes".

7. The price petitioner paid for fuel was approximately the same as that which petitioner would have paid at service stations. However, it was advantageous for petitioner to have the fuel delivered since it avoided the expense of paying an individual to take a truck to a fuel station.

8. It was petitioner's impression that taxes were being paid at the time funds were remitted to Hill. Petitioner first learned that Hill was not a registered vendor in the course of the audit. Upon learning that Hill was not a registered vendor, petitioner ceased making purchases from Hill.

9. Petitioner is not aware of any vendor whose invoices contain a breakdown of the taxes paid. Most suppliers known to petitioner issue a receipt which states that all taxes are included.

10. Petitioner cooperated with the audit of its business activities.

11. In accordance with New York State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been accepted and substantially incorporated herein. Petitioner's proposed "Ultimate Findings of Fact" are rejected since they are in the nature of conclusions of law.

## SUMMARY OF PETITIONER'S POSITION

12. At the hearing, petitioner argued on the basis of Tax Law § 289-c(1) that it paid motor fuel tax when payment was made to Hill. In this regard, petitioner maintains that all of the distributors of motor fuel known to petitioner utilize invoices similar to that used by Hill. Petitioner

submits that it could reconstruct the information sought by the Audit Division and that the Audit Division is seeking to punish Mr. Hill but it is either unable or unwilling since he is a Native American. Therefore, it wishes to punish petitioner instead. It is argued that the foregoing amounts to selective prosecution. Petitioner further argues that a credit should be allowed since Hill, as a vendor, was a constructive trustee of the tax for the benefit of the State of New York.

13. Petitioner maintains that the recordkeeping requirements of 20 NYCRR 493.3(b) are inapplicable since the regulation was promulgated under Tax Law § 507 and not Tax Law § 503-a(3) which pertains to credits. Lastly, petitioner has argued that the complexity and duplicativeness of regulations 20 NYCRR 420.9 and 493.3(b) render them void for vagueness. Moreover, the application of the regulations has put petitioner in a position of being unable to protect itself from having to pay taxes twice.

## CONCLUSIONS OF LAW

A. That Tax Law § 503-a(3) provides for a credit against the fuel use tax for fuel purchased in New York and used in New York. The credit is computed by adding together a fuel tax component and a sales tax component. No credit is allowed unless the motor fuel tax and sales tax upon the purchase of the fuel have been paid by the carrier. A carrier claiming this credit may be required to furnish evidence of payment of such taxes (Tax Law § 503-a[3]).

B. That whenever a customer is given a sales slip or invoice, the sales tax must be shown separately (Tax Law § 1132[a]; 20 NYCRR 532.1[b][1]). Similarly, the regulations promulgated pursuant to the Highway Use Tax Law provide that invoices shall state, among other things, the Federal, State and local excise and sales taxes charged (20 NYCRR 493.3[b]). In this instance, petitioner was unable to provide invoices separately showing that either motor fuel tax or sales tax had been charged. Consequently, it was reasonable for the Audit Division to conclude that neither motor fuel tax nor sales tax had been charged on its purchases from Hill (see Matter of Food Concepts v. State Tax Commn., 122 AD2d 371, lv denied 68 NY2d 610).[1]

It is noted that petitioner's reliance upon Tax Law § 289-c(1) to establish that tax was paid is misplaced. This section provides that when tax is paid by the distributor, the tax shall be deemed to have been paid for the account of the purchaser. In this instance, Hill was not a registered vendor and therefore it must be presumed that Hill was not remitting tax. Consequently, petitioner may not rely upon Tax Law § 289-c(1) to establish that tax was paid.

In this regard, it may be observed that Tax Law § 282-a sets forth special provisions with respect to diesel motor fuel. As the owner of motor vehicles utilizing diesel motor fuel which are used on the public highways of New York, petitioner is considered a distributor within the meaning of Article 12-A of the Tax Law. Moreover, with respect to diesel truck operators, 20 NYCRR 420.9 imposes detailed recordkeeping requirements including maintaining delivery tickets and invoices of purchases showing the amount of the New York diesel motor fuel tax included in the sale price.

C. That petitioner has attempted to cast the difficulty presented herein as the Audit

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[1]The Highway Use Tax Law does not contain any provision which precludes the Audit Division from withdrawing its notice under Article 12-A of the Tax Law and issuing a notice under Article 21 of the Tax Law.

Division's attempt to punish Mr. Hill through petitioner. This is clearly not the case. The assessment arose from a failure to maintain records required by statute and regulation. If these records were maintained, Hill's failure to register as a vendor would have been of no consequence. Moreover, petitioner's ability to "reconstruct" the invoices to show the information required is irrelevant. Such a reconstruction would not establish that the appropriate taxes were paid at the time of the purchase.

D. That petitioner's argument that 20 NYCRR 493.3(b) is inapplicable since it was promulgated pursuant to Tax Law § 507 and not Tax Law § 503-a(3), pertaining to a credit, is without merit. Tax Law § 507 requires carriers to maintain records. Certainly, it is reasonable that the regulation governing records should be promulgated pursuant to this section.

E. That 20 NYCRR 420.9(a) provides that delivery tickets or invoices documenting retail purchases must show the amount of New York diesel motor fuel tax included in the sale price. As noted, 20 NYCRR 493.3(b) provides that invoices shall state, among other things, the Federal, State and local excise and sales tax charged. These regulations are not duplicative since 20 NYCRR 420.9(a) pertains to Article 12-A of the Tax Law and 20 NYCRR 493.3.(b) was promulgated pursuant to Article 21 of the Tax Law.

F. That "[d]ue process requires a sufficient degree of precision in legislation to provide 'a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' (citation omitted)" (Wegman's Food Market v. State of New York, 76 AD2d 95, 101). The regulations in question, 20 NYCRR 420.9 and 493.3(b), clearly satisfy this standard. Accordingly, petitioner's argument that these regulations are void for vagueness is rejected.

G. That petitioner's remaining argument appears to be that 20 NYCRR 493.3(b) is unconstitutional since it is impossible for petitioner to avoid paying the taxes twice. This position is clearly without merit since, if petitioner had obtained invoices which separately set forth the motor fuel and sales taxes, it would have been of no consequence that Hill was an unregistered vendor.

H. That during the period in issue, Tax Law § 512(3) and 20 NYCRR 488.1 provided for the discretionary remission of penalties and interest in excess of the minimum. In view of all the facts and circumstances presented including petitioner's belief that it was paying the proper taxes and petitioner's cooperation with the audit, the penalties and interest in excess of the minimum are cancelled.

I. That the petition of Riluc Co., Inc. is granted to the extent of Conclusion of Law "H" and the Audit Division is directed to reduce the amount of tax assessed accordingly; the Assessment of Unpaid Fuel Use Tax, dated October 18, 1985, is in all other respects sustained.

DATED: Albany, New York
July 8, 1988

/s/

ADMINISTRATIVE LAW JUDGE