STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALLIED GROCERS COOPERATIVE, INC.	:	DETERMINATION
for Review of a Denial, Suspension, Cancellation or Revocation of a License, Permit or Registration under Articles 20 and 20-A of the Tax Law.	:	

Petitioner, Allied Grocers Cooperative, Inc., One Market Circle, Windsor, Connecticut 06095, filed petitions for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 20 and 20-A of the Tax Law (File Nos. 805942 and 806031).

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, W.A. Harriman State Office Campus, Albany, New York, on September 29, 1988 at 10:30 A.M. and continued to conclusion on October 24, 1988 at 1:15 P.M., with all briefs to be submitted by January 17, 1989. Petitioner appeared by Davis and Trotta (Robert D. Trotta, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether Tax Law § 480(2)(b), which authorizes the Commissioner of Taxation and Finance to refuse to license as a cigarette wholesale dealer or agent an applicant convicted of a crime provided for in the Tax Law within the preceding five years, may be applied to an applicant convicted of a Tax Law crime prior to the effective date of the licensing statute.

II. Whether the retroactive application of Tax Law § 480(2)(b) violates the ex post facto clause of the United States Constitution.

III. Whether the retroactive application of Tax Law § 480(2)(b) violates petitioner's constitutional guarantees of due process.

IV. Whether the Commissioner of Taxation and Finance abused his discretion by proposing to suspend petitioner's license as a wholesale dealer for the maximum period allowed by law.

V. Whether the Cigarette Marketing Standards Act violates the commerce clause of the United States Constitution.

FINDINGS OF FACT

1. Petitioner, Allied Grocers Cooperative, Inc. ("Allied"), is a cooperative organization

with approximately 247 members, including approximately 60 New York members. Its business offices and storage facilities are located in Windsor, Connecticut. Allied has been, and is now, licensed by New York as a cigarette stamping agent and a wholesale dealer in cigarettes.

2. In January 1987, Allied pleaded guilty to five counts of violating section 484(a)(1) of the Tax Law, a class B misdemeanor. Specifically, Allied was involved in a rebate scheme whereby its members were sold cigarettes at a price below the minimum provided for by statute.

3. The rebate scheme was instituted by the head of Allied's sales and service department. It was ended when an investigation of Allied's pricing policies was begun. Allied cooperated fully in the investigation and provided the investigators with complete access to its computerized records. The person instigating the rebate scheme no longer works for Allied.

4. On December 4, 1987, the Division of Taxation issued to Allied a Notice of Proposed Suspension of License as a Wholesale Dealer of Cigarettes. The notice advised Allied that pursuant to Tax Law § 484(a)(4) the Division proposed to suspend its wholesale dealer's license for a period of 30 days, based upon Allied's violations of Tax Law § 484(a)(1).

5. Allied timely filed a request for a conciliation conference challenging the proposed suspension. On May 20, 1988, the Bureau of Conciliation and Mediation Services issued an order sustaining the suspension notice. On August 16, 1988, Allied filed a petition with the Division of Tax Appeals, seeking review of the notice of proposed suspension.

6. On July 29, 1988, Allied submitted an Application for License as a Cigarette Agent and an Application for License as a Wholesale Dealer of Cigarettes. The applications were complete, but Allied responded "No" to the question asking if the applicant had been convicted of a crime in the past five years.

7. On August 18, 1988, the Division of Taxation issued to Allied a Notice of Proposed Refusal to Relicense as a Cigarette Agent/Wholesale Dealer. A letter accompanying the notice explained that the decision to refuse licenses to Allied was based upon Allied's pleas of guilty to violations of section 484(a)(1) of the Tax Law.

8. Denial of a wholesale dealer's license and a cigarette stamping agent's license will cause Allied to lose sales in all areas of its business operations. Allied's customers purchase not only cigarettes, but also candy and other grocery items, from Allied. They can reasonably be expected to turn to other suppliers if Allied is no longer able to sell cigarettes. Allied's comptroller estimated that Allied's annual gross profits will be reduced by at least $578,000.00, if Allied is not able to provide its customers with cigarettes.

CONCLUSIONS OF LAW

A. In 1939, New York State first imposed a tax on cigarettes possessed for sale in the State (Tax Law art 20). Liability for collection and payment of the tax was placed on the cigarette agent, who paid the tax either by purchasing stamps or through the use of a metering machine; the amount of the tax was passed through from the agent or dealer to the ultimate consumer of the cigarettes (Tax Law § 471).

Wholesale dealers in cigarettes were required to be licensed by the State Tax Commission (now, the Commissioner of Taxation and Finance), but cigarette agents were not subject to

licensing requirements. No licensing fee was imposed. Once obtained, a license remained in effect until revoked or suspended for cause or surrendered. A violation of any provision of article 20 or the regulations issued under it constituted "cause" to refuse to issue or to suspend or revoke a license. A wholesale dealer could not sell cigarettes without a license, and agents were forbidden to sell cigarettes to unlicensed dealers (Tax Law § 480).

In 1985, the Legislature amended the Tax Law by the adoption of Article 20-A, commonly referred to as the Cigarette Standards Marketing Act (CSMA) (L 1985, ch 897, eff September 1, 1985). The purposes of CSMA are set forth in the legislative findings.

> "The legislature hereby finds that it is necessary to regulate and control the sales price of cigarettes within the state at the wholesale and retail levels for the purpose of stabilizing the cigarette industry in New York state. The legislature finds that predatory pricing by cigarette dealers from states surrounding New York has contributed to the destruction of the price structure in New York state. Those dealers, who are protected in the home states by cigarette sales price laws similar to that contained in this act, have had an unfair advantage over New York cigarette dealers. This act is enacted by the legislature to prevent the movement of the cigarette distribution industry outside of New York, with the loss of jobs attendant to such a move and to prevent the sale of untaxed cigarettes and the evasion of state and local cigarette and sales taxes" (L 1985, ch 897, § 1).

CSMA established minimum percentage markups to be used by wholesale dealers and retailers in determining the minimum price of cigarettes, and it made it illegal for a wholesale dealer or retailer to sell cigarettes in New York at less than the minimum price (Tax Law §§ 484[a][1], [2] and [3]). The statute also provided civil penalties for the violation of acts proscribed by CSMA.

> "The license of any wholesale dealer who violates any of the provisions of this article shall <u>be</u> suspended, after due notice and opportunity of hearing, for a period of not less than five days nor more than thirty days for a first offense, and shall <u>be</u> revoked for a second offense" (Tax Law § 484[a][4] [emphasis added]).

A violation of article 20-A constituted a class B misdemeanor (Tax Law § 1829). This was the state of the law at the time that Allied entered its guilty pleas to five counts of violating section 484(a)(1) in January 1987. The Commissioner conceded that at the time of Allied's pleas, he lacked the power to revoke Allied's license on the basis of the guilty pleas alone.

From the onset of the CSMA minimum pricing structure, complaints were heard from both wholesale dealers and retailers subject to its strictures. These complaints generally fell into two categories. First, some agents, wholesale dealers and food merchants charged that some members of the industry were taking advantage of the minimum pricing scheme by giving illegal rebates to retailers and thus grabbing accounts from wholesalers who refused to rebate illegally. Second, smaller retailers and subjobbers complained that the chain store provision of CSMA favored large retail chains over other retailers (Letter from Roderick G.W. Chu, Commissioner of Taxation and Finance, to the Honorable Mario M. Cuomo, [July 17, 1987], Governor's Bill Jacket, L 1987, ch 860). After much debate, a bill was passed to remedy the perceived inequities of CSMA and to increase compliance with the cigarette tax imposed under article 20 (Governor's Memorandum of Approval of Chapter 860 of the Laws of 1987 [December 23, 1987], Governor's

Bill Jacket, supra).

Chapter 860 of the Laws of 1987 revised CSMA and article 20 by, among other things, shrinking the margins between wholesale purchase prices and minimum selling prices under CSMA, expanding the definition of a "chain store" and extensively revising the licensing provisions found in article 20.

Section 472 of the Tax Law was amended to require licensing of cigarette agents, and a license application fee of $1,500.00 was imposed (L 1987, ch 860, § 1). Section 2 of chapter 860 amended the licensing provisions of Tax Law § 480. An application fee of $1,500.00 is now imposed for a wholesale dealer's license (Tax Law § 480[1]). As under prior law, once granted "a license shall continue in effect until revoked or suspended for cause or surrendered", except as provided in Tax Law § 480(4) (Tax Law § 480[1]). Subdivision 4 of section 480 provides:

> "If the commissioner of taxation and finance considers it necessary for the proper administration of the cigarette tax imposed by this article or the cigarette marketing standards contained in article twenty-A of this chapter he may require every person under this article who holds a license to file a new application for a license in such form and at such time as the commissioner may prescribe and to surrender such license. The commissioner may require such filing and such surrender not more often than once every three years. Upon the filing of such application with the proper fee and the surrender of such license, the commissioner shall issue, within such time as he may prescribe, a new license to each applicant."

Section 15 of chapter 860 provides: "The commissioner of taxation and finance shall relicense and reregister agents, wholesale dealers and chain stores before April first, nineteen hundred eighty-eight." This date was later changed to August 1, 1988 (L 1988, ch 4, § 5). Thus, the amended statute required all licensed wholesale dealers to surrender their licenses and file new applications for licenses, and it also directed the Commissioner to relicense such dealers by the statutory deadline.

Chapter 860 substantially revised the standards to be applied by the Commissioner in determining whether to issue a license. The Commissioner may refuse to issue a license where it has been ascertained that (1) any tax imposed under the Tax Law or a related statute has been finally determined to be due from the applicant or a controlling person and has not been paid in full (Tax Law § 480[2][a]); (2) the applicant or a controlling person has been convicted of a Tax Law crime within the preceding five years (Tax Law § 480[2][b]); (3) the license of the applicant has been cancelled or suspended within the preceding five years (Tax Law § 480 [2][d]); (4) the applicant or the controlling person was the controlling person in another wholesale dealer when one of the first three enumerated acts occurred (Tax Law § 480[2][c]); (5) any controlling person of the applicant has committed any of the specifically enumerated acts which form a basis for cancellation or suspension of a license under Tax Law § 480(3) (Tax Law § 480[2][e]).

Section 6 of chapter 860 renumbered and amended Tax Law § 484(a)(4) (now Tax Law § 484[a][5]) to include within its scope agents as well as wholesale dealers.

B. Allied first argues that the Commissioner was required to license Allied as an agent and relicense it as a wholesale dealer by the plain language of the statute ("the commissioner...shall relicense and reregister agents [and] wholesale dealers...before August first, nineteen hundred eighty-eight" [L 1988, ch 4, § 15 (emphasis added)]). Allied maintains that

this language expresses the Legislature's intention that the Commissioner issue licenses to all existing licensees without any exercise of discretion.

Generally, the use of words of command in a statute are construed as peremptory (that is to say, "shall" generally means "shall"); however, that is not always the case. "Whether a given provision of a statute is mandatory or directory cannot be made to depend on form alone; it goes to the substance and is to be determined by the legislative intent, not by the language in which the intent is clothed" (McKinney's Cons Laws of NY, Book 1, Statutes § 177[a]). Here, the Legislature substantially revised the licensing provisions of Tax Law § 480, and as a part of the licensing program, it required all existing licensees to surrender their licenses and submit new applications (Tax Law § 480[4]); L 1987, ch 860, § 15). Such a procedure would not have been necessary if the Legislature intended the automatic relicensing of all existing licensees. From this, it is concluded that the mandatory language of section 15 was intended to apply to the date by which the relicensing program was to be completed and was not intended to inhibit the Commissioner's exercise of discretion under Tax Law § 480(2).

C. It is Allied's position that the Commissioner's refusal to issue it a wholesale dealer's or agent's license, based on Allied's admitted violations of Tax Law § 484(a)(1), amounts to a retroactive application of the newly enacted licensing provisions, and, as such, it is barred by general principles of statutory construction, the ex post facto clause of the United States Constitution, and Allied's guarantee of due process of law. Allied also argues that CSMA is in violation of the commerce clause.

D. As a starting point, it must be determined whether Tax Law § 480(2) was intended to apply retroactively to acts occurring before the effective date of the statute. Generally, statutes are to be construed as prospective in operation and are not to be applied retroactively unless there is a clear expression of legislative intent that the statute be given a retroactive construction (Matter of Hodes v. Axelrod, 70 NY2d 364, 369; Gleason v. Gleason, 26 NY2d 28, 36). The clearest guide to determining the Legislature's intention is in the language of the statute itself (McKinney's Cons Laws of NY, Book 1, Statutes § 51[d]). Here, Tax Law § 480(2)(b) is very explicit in providing that the Commissioner may refuse to license an applicant who has been convicted of a Tax Law crime within the preceding five years. The legislative history confirms that this provision was intended to apply to applicants convicted of such a crime before the effective date of the statute. A major criticism which led to the amendment of CSMA was that wholesale dealers and agents who violated the law by giving illegal rebates had a competitive advantage over those obeying the law. The amendment of articles 20 and 20-A was intended to increase compliance with the cigarette tax and CSMA in two ways: first, by decreasing the minimum percentage markups to be used by wholesale dealers, and second, by establishing a program of licensing and periodic relicensing of wholesale dealers and agents. The new licensing program was to begin with the relicensing of all existing licensees. In establishing the relicensing program, the Legislature set forth explicit criteria to guide the Commissioner's discretion, including the provision at issue here. Thus, both the language of the statute and its legislative history indicate that Tax Law § 480(2) was intended to apply retroactively. Factors cited by Allied as evidence that the Legislature did not intend section 480(2) to operate retroactively are not persuasive.

Initially, Allied notes that the Legislature reenacted and amended Tax Law § 484(a)(5)(former § 484[a][4]) at the same time that it adopted Tax Law § 480(2)(b). The former provision mandates the suspension of an agent's or wholesale dealer's license for a violation of section 484 for a "period of not less than five days nor more than thirty days for a first offense". The latter provision authorizes the Commissioner to refuse to license an applicant

convicted of a violation of section 484, or any other Tax Law crime, within the preceding five years. Allied argues that the reenactment of section 484(a)(5) and the fact that section 480(2)(b) appears to authorize a harsher penalty than does the former provision establishes that the new licensing provisions were not intended to apply to convictions for violations of section 484 occurring before the effective dates of the newly amended statute. This argument does not stand up to scrutiny.

Having enacted the revised versions of Tax Law § 480 and Tax Law § 484 in the same chapter law, the Legislature clearly intended them to operate in tandem. Furthermore, there is no inconsistency between the two sections. Tax Law § 484(a)(5) provides a civil penalty for the commission of specific acts made illegal by CSMA. While the penalty prescribed is a license suspension, Tax Law § 484(a)(5) is not a licensing statute; that is to say, it does not delineate standards for obtaining or holding a license. Tax Law § 480(2) is not intended to penalize persons for violating the Tax Law, but to regulate the cigarette marketing industry and increase compliance with the Tax Law by establishing licensing standards for persons performing certain duties under the Tax Law. The penalty provision mandates a license suspension for a first violation of Tax Law § 484, while the licensing provisions give the Commissioner the discretion to consider whether a conviction for violation of section 484 or any other Tax Law crime warrants a refusal to license.

Allied also argues that the Legislature's postponement of the effective date of the statute (the statute was to take effect 30 days after being signed into law) is further evidence that it was not intended to be applied retroactively. Although such a postponement is some evidence of legislative intent (O'Connor v. Long Island R.R., 63 AD2d 1015, appeal dismissed 48 NY2d 668), it is certainly not determinative of the issue.

Finally, Allied's contention that only a prospective construction of Tax Law § 480 is consistent with the Legislature's purpose is contradicted by the legislative history described above.

In accordance with the above discussion, it is concluded that Tax Law § 480(2)(b) was intended to allow the Commissioner to refuse to license Allied on the basis of its convictions for violating Tax Law § 484(a)(1).

E. Having determined that Tax Law § 480(2) was intended to operate retroactively, it is next necessary to determine whether retroactive application is barred by the ex post facto prohibition or guarantees of due process of law.

An ex post facto law is one which imposes punishment on an act not punishable when committed or one which imposes a greater penalty on the offender than the penalty imposed when the offense was committed (Weaver v. Graham, 450 US 24, 28-29). The constitutional ban on the enactment of ex post facto legislation traditionally applies only to criminal statutes (see, Ames v. Merrill Lynch, Pierce, Fenner & Smith, 567 F2d 1174, 1179). However, it may apply to civil penalties which are so punitive in nature as to amount to criminal penalties in disguise (Louis Vuitton S.A. v. Spencer Handbags Corp., 597 F Supp 1186, 1194, affd 765 F2d 966). Allied argues that since its convictions for violating Tax Law § 484(a)(1) occurred before the effective date of the amended licensing provisions, a refusal to license Allied as either an agent or a wholesale dealer amounts to an impermissible additional penalty. This is not the case.

The purpose of Tax Law § 480 is to regulate the cigarette industry, in part, by granting the Commissioner the authority to prohibit persons who have violated the Tax Law from obtaining

licenses as agents or wholesale dealers. It is not intended to punish for past activity but to regulate a present situation. A law which prescribes the qualifications of persons who are to discharge certain duties is not an ex post facto law despite the fact that it may deny a license to a person on the basis of a criminal conviction occurring before the effective date of the licensing statute (De Veau v. Braisted, 363 US 144, 160; Matter of Springer v. Whalen, 68 AD2d 1011, 1012).

Having determined that Tax Law § 480 is not an ex post facto law, it is next necessary to consider whether its application to Allied offends due process.

Although there is no constitutional ban on legislation which reaches back to establish the legal significance of acts occurring before the enactment of such legislation, retroactive legislation which is unduly harsh or oppressive may violate due process guarantees (see, Canisius College v. United States, 799 F2d 18, 25; Matter of Hodes v. Axelrod, supra at 369-370). However, the harsh and oppressive standard does not differ from the prohibition against arbitrary and irrational legislation. A retroactive statute will stand if it is supported by a legitimate legislative purpose furthered by rational means (Pension Benefit Guaranty Corp. v. Gray & Co., 467 US 717, 733).

Among the factors to be considered in determining whether retroactive application of a statute is harsh and oppressive is whether it abrogates a vested right (Canisius College v. United States, supra at 25). A license is a statutory creation and as such is subject to reasonable regulation and restriction. "The State may change the right to hold a license which it has granted or the conditions under which it may be held. Such a right is not a vested right" (Matter of Lap v. Axelrod, 95 AD2d 457, 459).

Another factor to be considered is whether the taxpayer reasonably relied on prior law, so that, had he been able to foresee the passage of the new legislation, he would have acted to avoid its negative consequences (Canisius College v. United States, supra at 26). Petitioner maintains that it pleaded guilty to violations of Tax Law § 484(a)(1) in reliance on the then existing statute which limited the civil penalty for a first offense to a license suspension of no more than 30 days. That may be so, but, as has been repeated several times, it is necessary to distinguish between the civil penalty provisions of Tax Law § 484(a)(5) and the licensing provisions of Tax Law § 480. Since the State has the power to prescribe the qualifications of a license holder, it undoubtedly has the power to amend those qualifications. A mere expectation based on a continuation of present general laws does not constitute a vested right, and the disappointment of that expectation does not violate due process (see, Gleason v. Gleason, supra at 39; Ten Ten Lincoln Place v. Consolidated Edison Co. of New York, 190 Misc 174, affd 273 App Div 903).

A third factor to be considered is the public policy to be served by the legislation (see, Matter of Hodes v. Axelrod, supra at 371-372). The purpose of the revisions of articles 20 and 21-A was to increase compliance with the cigarette tax and CSMA (Governor's Memorandum of Approval, supra).

The statute sought to achieve this end, in part, by directing: (1) the surrender of all existing wholesale dealer's licenses and (2) the licensing of agents and relicensing of wholesale dealers in light of the new provisions of Tax Law § 480(2) (Tax Law § 480[4]; L 1987, ch 860, § 15 as amended by L 1988, ch 4, § 15). The application of the new provisions to all applicants, whether they previously held licenses or not, is rationally related to the legislative purpose of the amended statute, and it results in equal treatment of all applicants.

In sum, since application of the amended statute to Allied does not affect a vested right and is rationally related to a legitimate government purpose, there has been no violation of Allied's right to due process of law.

F. It is Allied's position that the imposition of the 30-day maximum suspension for its violations of Tax Law § 484(a)(1) was arbitrary and capricious. The notices were issued almost one year after guilty pleas were entered and at least six months after the Division of Taxation became aware of the convictions. Moreover, there is no evidence that the Division considered any factor, other than the convictions themselves, in determining the length of the suspension. Allied argues then that the Commissioner's determination was not an exercise of discretion, but an arbitrary act.

The Commissioner may be found to have abused his discretion, where he acts in an arbitrary or inconsistent manner (Matter of Sapolin Paints v. Tully, 55 AD2d 759, 760). However, the mere fact that the Commissioner considered only the nature, number and degree of the violations does not establish an abuse of discretion. Inasmuch as the 30-day suspension was authorized by statute, it must be upheld.

G. Finally, Allied contends that CSMA violates the commerce clause of the United States Constitution. The Division of Tax Appeals is without authority to declare an act of the Legislature unconstitutional (Califano v. Sanders, 430 US 99, 109; Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). It is presumed that statutes in general and chapter 860 of the laws of 1987 in particular are constitutional.

H. The petitions of Allied Grocers Cooperatives, Inc. are denied in all respects.

DATED: Albany, New York
February 9, 1989

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE