

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
BRAY TERMINALS, INC.	: DETERMINATION
	DTA NO.
807095	
for Redetermination of a Deficiency or for	:
Refund of Corporation Franchise Tax under	
Article 9-A of the Tax Law for the Years 1984	:
through 1986.	

Petitioner, Bray Terminals, Inc., 16 Pearl Street, P.O. Box 965, Glens Falls, New York 12801, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1984 through 1986.

On October 18, 1984, the Division of Taxation ("Division") filed a Notice of Motion to Dismiss pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.5(b), on the grounds that the petition fails to state a cause for relief and is barred by the doctrine of res judicata. The Division's motion was supported by the affidavit of Brian J. McCann, Esq., sworn to October 18, 1994 and attachments thereto. Petitioner, by its former representative, Carl S. Levine, Esq., filed an affirmation in opposition to the Division's motion to dismiss dated November 4, 1994, in response to the Division's motion to dismiss.

Upon review of the motion documents and the documentation submitted with respect to the Division's motion to dismiss, Administrative Law Judge Catherine M. Bennett converted the

Division's Motion to Dismiss to a Motion for Summary Determination consistent with and pursuant to the Tax Appeals Tribunal Rules of Practice and Procedure section 3000.5(b)(2) and CPLR 3211(c). The parties were thereafter given additional time to introduce evidence and address supporting arguments pertaining to the issues in this matter. Thereafter, during January 1995, petitioner obtained new representation by the firm of Roemer and Featherstonhaugh, P.C. (James D. Featherstonhaugh, Esq., of counsel). The parties were allowed until April 5, 1995 to submit documents pertaining to the motion for summary determination.

On March 3, 1995, the Division submitted correspondence in lieu of a brief setting forth its position. The Division of Tax Appeals received petitioner's brief in opposition to the converted motion for summary determination on March 3, 1995, bearing numerous attachments, accompanied by affidavits in opposition to the Division's converted motion by Dana Bray, president of Bray Terminals, Inc., and petitioner's representative, James D. Featherstonhaugh. On April 5, 1995, the Division submitted a reply brief in this matter. Upon review of the motion documents, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

Following an audit conducted by the Division, petitioner, Bray Terminals, Inc. ("Bray"), was assessed for additional franchise tax found to be due for the years 1984, 1985 and 1986 by three notices of deficiency dated March 22, 1988, as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Interest</u>	<u>Total</u>
12/31/84	\$ 63,688.00	\$18,705.58	\$
82,393.58			
12/31/85	\$ 71,234.00	\$10,748.95	\$
81,982.29			
12/31/86	\$ <u>40,113.00</u>	\$ <u>1,906.42</u>	
\$ <u>42,019.42</u>			
Totals	\$175,035.00	\$31,360.95	
\$206,395.95			

The notices were reviewed by the Bureau of Conciliation and Mediation Services and, by Conciliation Order dated May 19, 1989, the statutory notices were sustained reflecting no change.

Thereafter, Bray filed a timely petition with the Division of Tax Appeals which was received on July 7, 1989, seeking redetermination of the deficiencies on the grounds that Article 9-A's "addback provision", specifically Tax Law § 208(9)(b)(4), was unconstitutional and illegal in that it violated the Commerce Clause, denied petitioner equal protection and amounted to impermissible double taxation.

Petitioner's argument with respect to interstate commerce is that Article 9-A impermissibly discriminates against suppliers such as Bray who import petroleum for sale into New York State to the detriment of interstate commerce. Suppliers and distributors who purchase petroleum within the State and sell or consume such petroleum in the State, are allowed to deduct the gross receipts tax paid from their income to establish their franchise tax liability, unlike those who import or cause to be imported petroleum products into the State of New York. This distinction, petitioner argues, discriminates against supporting suppliers such as Bray.

The petition also argues that the addback requirement of Article 9-A amounts to a tax on a tax. Since Tax Law § 208(9)(b)(4) provides that a taxpayer's entire net income is determined without exclusion, deduction, or credit of taxes imposed under Article 13-A (the gross receipts tax ["GRT"]), the Division maintains that Bray must treat as income for State franchise tax purposes the New York State gross receipts taxes it previously paid. As a result, since Article 9-A imposes a tax of 10% on the corporation's entire net income, the artificial increase in income by the GRT amounts to a 10% tax on the GRT.

At approximately the same time that petitioner pursued its administrative remedies with the Division of Tax Appeals, it also initiated a declaratory judgment action in the New York State Supreme Court, Nassau County. Such action sought a declaration that Article 9-A as applied to petitioner resulted in an unconstitutional denial of rights guaranteed by the Commerce Clause and the State and Federal Equal Protection clauses. Although the action did not seek a judgment as to the constitutionality of Article 13-A, the same was addressed by the court. As to Bray, the declaratory judgment action was unsuccessful, and resulted in the dismissal of its complaint, holding that Article 9-A and Article 13-A were constitutional. Bray (along with other plaintiffs) appealed the decision to the Appellate Division which affirmed the judgment. An appeal was rejected by the Court of Appeals, and lastly, the U.S. Supreme Court denied a petition for certiorari on June 6, 1994 (Bray

Terminals v. New York State Dept. of Taxation & Fin., Sup Ct, Nassau County, June 19, 1990, affd 191 AD2d 668, 596 NYS2d 717, appeal dismissed 82 NY2d 748, 602 NYS2d 806, lv denied 82 NY2d 664, 610 NYS2d 151, cert denied ____ US ____ 114 S Ct 2165).

The Division attempted to encourage petitioner to voluntarily withdraw the petition in question subsequent to the denial by the Supreme Court to review petitioner's case. When petitioner failed to withdraw the petition, the Division made a motion before the Division of Tax Appeals to dismiss the petition on the grounds that it failed to state a cause of action and was barred by the doctrine of res judicata. The Division also sought sanctions under Tax Law § 2018 for the commencement or maintenance of a frivolous action.

Petitioner submitted an affidavit in opposition to the Division's Motion to Dismiss claiming that a subsequent Albany County Supreme Court decision, Tug Buster Bouchard v. Wetzler (NYLJ, July 11, 1994 [Sup Ct, Albany County]), upholding a facial challenge to Article 13-A, required the filing of a petition in order for Bray to protect its right. Petitioner maintains that if Article 13-A is unconstitutional, the Division could not require petitioner to "addback" the GRT when computing its annual franchise tax liability under Article 9-A. The Division, in its reply affirmation, stated that Tug Buster was not applicable to the particular provision of the Tax Law questioned by Bray. In addition, to the extent applicable, Tug Buster was directly at odds with the results of the declaratory judgment action initiated by Bray.

Sua sponte, Administrative Law Judge Catherine M. Bennett converted the Division's Motion to Dismiss to a Motion for Summary Determination, pursuant to the Tax Appeals Tribunal Rules of Practice and Procedure and the CPLR.

Petitioner claims that during tax years 1984, 1985 and 1986 it accounted for the GRT as a pass-through item, rather than including GRT as income and thereafter deducting the taxes as an expense. Petitioner provided two affidavits in this matter in support of its position and as a means of explanation. The first was that of Dana Bray, president of Bray Terminals. He stated:

"For taxable years 1984, 1985 and 1986, Bray did not deduct Gross receipts tax collected from its Federal income for purposes of determining its entire net income for Article 9A corporate franchise tax liability.

"In fact, the gross receipts tax was handled as a pass through item. Billings to the customers for the tax were credited as a liability on the balance sheet and not included in income. Payments of the tax were recorded as a reduction of the liability account and were not recorded as an expense item. As a result, no adjustments were made for income tax purposes."

The second affidavit was that of petitioner's representative. It set forth petitioner's opposition to the converted motion and reiterated petitioner's position on each of the issues, as more fully described below.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts the following:

(a) The motion for summary determination must fail since the Division has not proven the absence of material issues of fact;

(b) Regardless of whether material issues of fact exist, petitioner is entitled to a redetermination of the deficiencies because, as a matter of law, the Article 9-A addback amounts to impermissible double taxation;

(c) Petitioner has set forth a cause of action challenging the constitutionality of Article 13-A's GRT and petitioner is not barred by the result of the declaratory judgment action, since neither Bray nor the Division challenged the constitutionality of Article 13-A. A gratuitous judgment should not be given res judicata effect;

(d) Article 13-A is unconstitutional because it discriminates against interstate commerce in violation of the Commerce Clause of the U.S. Constitution; and

(e) Petitioner has not maintained a frivolous proceeding as prohibited by Tax Law § 2018.

The Division asserts that:

(a) No material and triable issues of fact exist and thus this matter is an appropriate subject for a motion for summary determination;

(b) Double taxation does not exist since the two taxes (GRT and franchise tax) are imposed on different bases;

(c) Even if double taxation resulted, it is not prohibited;

(d) The fact that petitioner handled the GRT as a pass-through item is immaterial to the reason for the assessments in issue;

(e) The claim of unconstitutionality is not one over

which the Division of Tax Appeals has jurisdiction;

(f) The Tug Buster decision, which declared section 301 of Article 13-A to be a facial violation of the Commerce Clause, is distinguishable from this matter since the tax there at issue was tax imposed upon petroleum imported and consumed in the State. Although Bray imported, it did so not for its consumption, but for its sale to others;

(g) The declaratory judgment in the Bray matter is entitled to res judicata treatment and should act to bar the present administrative proceeding; and

(h) Petitioner has not established a Commerce Clause violation.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) after issue has been joined. The regulation provides, in pertinent part, that:

"Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact." (Emphasis added.)

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material

issues of fact from the case" (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316, 317, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Department, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

B. In an attempt to defeat the motion for summary determination, petitioner offers several theories, which are hereinafter discussed.

In this matter, petitioner argues that when a motion for summary determination originates from a motion to dismiss for failure to state a claim, the pleadings are deemed to be true, citing Bailey v. Diamond International Corporation (47 AD2d 363, 367 NYS2d 107). Petitioner is in error with respect to the application of Bailey to pleading construction. The court's comments with regard to the pleadings are consistent with the general principles guiding motions for summary determination. It stated:

"on this motion for summary judgment [initially a motion to dismiss for failure to state a cause of action] the criterion to be applied is whether the plaintiffs have a cause of action, not whether they

have properly stated one" (id., 367 NYS2d at 110). The court ultimately ordered a trial merely because several issues of fact existed which were required to be addressed. The same result here would be applied if issues of fact are identified.

C. Petitioner attempted to construe Plaza Management Co. v. City Rent Agency (31 AD2d 347, 298 NYS2d 162, affd 25 NY2d 630, 306 NYS2d 11) as standing for the proposition that the constitutionality of a statute is a question of fact which necessitates a trial even where the declaratory judgment sought would not be warranted. The court actually stated that the constitutionality of a statute is a question which often gives rise to the type of rights determined by a declaratory judgment, not that the constitutionality issue itself is a question of fact. Petitioner's conclusion that summary determination is not appropriate merely because petitioner raised questions of constitutionality is disregarded as a misapplication of the court's statements.

D. The only facts raised by petitioner that could potentially be construed as "triable issues of fact", defeating a motion for summary determination, are those relating to the accounting of GRT for Federal income tax purposes. Petitioner explains that the GRT was not included in Federal taxable income, and thereafter also not deducted as an expense. Instead, the company handled the amounts as a pass-through item, utilizing a liability account, similar to sales tax. The Division does not confirm or deny the particular method used by

petitioner, but claims it is immaterial to a determination of the matter at hand. The Division argues the addback must still take place, since it is required to the extent the taxes are deductible, and not whether they are actually deducted.

The taxpayer's base entire net income ("ENI") for New York State taxation purposes begins with Federal entire taxable income, without the inclusion of items not pertinent to the discussion herein (Tax Law § 208[9]). Even though the GRT was never deducted from Federal gross income, the income reported was at "net", as though the income and corresponding expense had been properly recorded. Adding back the tax not deducted (because of the use of a "pass-through" liability account) places petitioner in no different position with respect to the calculation of New York ENI than if petitioner had utilized income statement accounts. The only possible effect would be a timing difference due to the accrual of the liability. To this extent how petitioner handled the GRT is immaterial. Accordingly, it is concluded that there are no material triable issues of fact that would require dismissal of the motion for summary determination.

E. The Laws of 1983 (ch 400, § 8) added a new Article 13-A to the Tax Law "imposing a privilege tax on all New York businesses, incorporated or unincorporated, engaged in importing (or causing the import of) petroleum for sale in this State, or in extracting, producing, refining, manufacturing or compounding petroleum" (Budget Report on Bills, June 29, 1983, Legislative Bill Jacket, L 1983, ch 400). This particular legislation

recognized that Federal tax laws allow corporations to deduct certain State taxes in reaching Federal taxable income and thus addressed such deduction and implemented a provision where the State law would require that these taxes be added back to total Federal taxable income in reaching entire net income. Such an intent by the Legislature is reflected in the creation of Tax Law § 208(9)(b)(4) and its reference to the addback of Article 13-A taxes. The statute is clear.

Rules of construction, for the purpose of interpreting ambiguity in a statute, are aids in the search for legislative intent. However, these rules have no function where there is no ambiguity. Where a statute's meaning is clear, it must be enforced as written. "There is no more persuasive evidence of the purpose of a statute than the words with which the Legislature undertook to give expression to its wishes" (1 Merten, Law of Federal Income Taxation § 3.05). The memorandum in support of the legislation enacting section 13-A indicates an intent to "equitably consolidate the existing gross receipts taxes imposed on the petroleum industry into a single tax" The intent is that the tax should apply to all competing petroleum businesses, with only a few exceptions not applicable herein, and was viewed as a "reliable continuing revenue source" (Memorandum in Support, Legislative Bill Jacket, L 1983, ch 400). While there is an inherent reluctance to impose a double tax, there is no absolute prohibition against double taxation (1 Mertens, Law of Federal Income Tax § 3.59). Where the lawmaking body has clearly expressed its intention,

the statute must be sustained even though double taxation results (Remco S.S. Co. v. Commr., 82 F2d 988; 36-1 US Tax Cas ¶ 9212, cert denied 299 US 555, 81 L Ed 409; Fort Smith Lumber Co. v. Arkansas, 251 US 532, 64 L Ed 396).

In this case, the intent of the Legislature was to create a privilege tax for the purpose of raising additional revenue. There has been no evidence introduced to the contrary. Regardless of how the tax is imposed and calculated, the language of the statute is clear and must be sustained even in light of the fact that double taxation in some form may occur in the calculation of this provision. Thus, petitioner's entire net income for purposes of Article 9-A should include Article 13-A taxes paid to New York State for the periods in question.

F. The next issue to be considered is whether the Division of Tax Appeals has subject matter jurisdiction to hear constitutional challenges against Tax Law § 208(9)(b)(4). The Division raises the issue that the rules of the Tax Appeals Tribunal, also governing the Division of Tax Appeals, prohibit constitutional challenges in its language which speaks to the resolution of controversies under due process requirements, and the fact that this issue has been faced in the past. It has been well established that the jurisdiction of the Division of Tax Appeals and the Tribunal, as prescribed by the enabling legislation, does not encompass challenges to the constitutionality of a statute on its face (Matter of Brussel, Tax Appeals Tribunal, June 25, 1992; Matter of Wizard Corp., Tax Appeals Tribunal, January 12, 1989; Matter of Fourth Day

Enterprises, Tax Appeals Tribunal, October 27, 1988). At this administrative level of review it is presumed that the statutes are constitutional.

G. Turning to whether the result of the declaratory judgment action should be given res judicata effect, petitioner argues that it should not be estopped from raising a constitutional challenge to the GRT by reason of the prior action, since the parties never challenged Article 13-A, and the order declaring its constitutionality was a gratuitous judgment which should not be given res judicata effect. The Division maintains, and petitioner does not dispute, that res judicata applies not only to claims actually litigated, but also to those that could have been litigated. The Division thus claims that the only remaining issue is whether the claims in this proceeding are the same, or ones that could have been litigated.

The theory of res judicata is discussed below:

"The doctrine of res judicata is designed to put an end to a matter once duly decided. It forbids relitigation of the matter as an unjustifiable duplication, an unwarranted burden on the courts as well as on opposing parties. Its main predicate is that the party against whom it is being invoked has already had a day in court, and, if it was not satisfactory, the proper course was to appeal the unsatisfactory result rather than ignore it and attempt its relitigation in a separate action.

"The phrase 'res judicata' has taken on several meanings. In its technical sense, res judicata is applicable only when a party is attempting to relitigate the whole cause of action; it intervenes in that instance to foreclose not only matters litigated, but also those which might have been litigated" (Siegel, NY Prac § 442, at 671 [2d ed]).

In reaching its conclusion that petitioner sought a determination on the same theories of unconstitutionality, and

the same end result in both matters, the Division correctly discusses the application of what has been referred to by the New York courts as a "transactional analysis." In a recent Appellate Division case the court explained the current school of thought:

"It is well settled, under the transactional analysis approach adopted by this State in deciding res judicata issues, that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' (O'Brien v. City of Syracuse, 54 NY2d 353, 357, 445 NYS2d 687, 429 NE2d 1158). The doctrine of collateral estoppel similarly bars relitigation where there is an identity of issue which has necessarily been decided, although not actually litigated, in the prior action which is decisive of the present action and where the party seeking to defeat the application of the doctrine, the plaintiffs herein, have had a full and fair opportunity to contest the decision now said to be controlling (Kaufman v. Eli Lilly & Co., 65 NY2d 449, 456, 492 NYS2d 584, 482 NE2d 63)." (Lanzano v. City of New York, 202 AD2d 378, 609 NYS2d 891, 892.)

H. Petitioner cites to Pike v. Irving Trust Co. (259 App Div 303, 19 NYS2d 219) and Finkelstein v. Equitable Life Assur. Soc. of United States (256 App Div 593, 11 NYS2d 135, affd 281 NY 690) as standing for the proposition that if a judgment purports to adjudicate matters not raised by the pleadings and not in issue between the parties, that part of the judgment is not conclusive upon such matters in subsequent proceedings. The res judicata effect of a judgment is not affected by the fact that no proof was offered as long as the parties had an opportunity to be heard on the merits of the cause of action and could have litigated the matter sought to be raised in the second action (5 Weinstein-Korn-Miller, NY Civ Prac ¶ 5011.17).

Petitioner's analysis essentially fails to take into account the transformation in this area. The broader definition accorded the transactional analysis of res judicata now employed by the New York courts "will mean that an increased number of items that were not litigated previously will now be foreclosed in [the] second suit since they should have been litigated as part of the first suit" (id.). In addition, the concepts advanced by the transactional analysis which pertain to the segment of cases that "might have been litigated" in the first instance, will also apply to claims for relief or theories of recovery that should have been made because they arose from the same series of transactions as the first suit (id.). However, no cause of action will be barred in a later action of a claim or defense of which a party was justifiably ignorant at the time the first action was brought, or where a relevant fact had not yet come into existence (id.). Such is not the case here.

I. Petitioner, an oil company and importer of petroleum, is considered a "petroleum business" subject to a gross receipts tax imposed pursuant to Article 13-A. Under New York State Tax Law, no deduction is allowed for Article 13-A taxes in the computation of franchise tax (Tax Law § 208[9][b][4]). In the declaratory judgment action commenced by petitioner in Supreme Court, Nassau County, petitioner alleged that the statutory requirements for the addback of Article 13-A tax payments to Federal taxable income in computing entire net income under Article 9-A franchise tax provisions violate the Commerce Clause of the United States Constitution and the Equal Protection

Clauses of both the United States and New York Constitutions. Petitioner asserted such claims on the basis that different entities in the petroleum chain are afforded different treatment. Although petitioner did not specifically challenge the constitutionality of Article 13-A, the judge presiding over the declaratory judgment action declared both Tax Law § 208(9)(b)(4) and Article 13-A constitutional. On appeal to the Appellate Division, petitioner focused on the constitutionality of Tax Law § 208(9)(b)(4) and other procedural considerations not pertinent to this discussion. Petitioner specifically stated in its (Appellate Division) brief that it was not challenging the applicability or constitutionality of the Article 13-A gross receipts tax (Brief for Appellant at 8, Bray Terminals v. Dept. of Taxation & Fin., 191 AD2d 668, 596 NYS2d 171, supra). The Division, however, fully addressed the constitutionality of the gross receipts tax and the addback provision. The Appellate Division affirmed the Supreme Court decision. In the present matter, petitioner now claims that, on the basis of the same transactions, i.e., the importation of petroleum, Article 13-A's gross receipts tax is unconstitutional.

Petitioner had a full and fair opportunity to litigate this matter and present its claims before the Appellate Division, as did the Division of Taxation. Applying the previously discussed transactional analysis approach, it is hereby determined that res judicata bars consideration of the constitutionality of Article 13-A. The caveats referred to by petitioner have

clearly been replaced by a much broader and practical approach to the litigation of claims arising from the same transaction or series of transactions, even if based upon different theories or if seeking different remedies (O'Brien v. City of Syracuse, supra).

J. Although the Division originally made a claim that petitioner had commenced a frivolous proceeding, this issue was later abandoned and is thus not herein addressed.

K. The Division of Taxation's Motion to Dismiss converted to a Motion for Summary Determination is hereby granted, and the Notices of Determination dated March 22, 1988 are sustained.

DATED: Troy, New York
October 5, 1995

Bennett

/s/ Catherine M.

ADMINISTRATIVE LAW JUDGE