STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BARBARA P. BILLAUER	:	DETERMINATION DTA NO. 815601
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 September 1, 1994 through November 30, 1994.	:	

Petitioner, Barbara P. Billauer, 146 Eva Drive, Lido Beach, New York 11561, filed a petition 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 September 1, 1994 through November 30, 1994.

On February 24, 1997, the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Michael B. Infantino, Esq., and John O. Michaelson, Esq. of counsel), served petitioner with a Notice of Motion for an Order to Dismiss Petition and Motion for Summary Determination and the affirmation of Mr. Michaelson in support of the motions. The motions and affirmation were filed with the Division of Tax Appeals on April 4, 1997. On or about March 25, 1997, petitioner, appearing on her own behalf, served the Division of Taxation with a Cross-Motion for Summary Determination Directing Judgment in Favor of Petitioner. The Division of Taxation filed an affirmation in opposition to petitioner's cross-motion on April 23, 1997. Petitioner's cross-motion was not filed with the Division of Tax Appeals until May 13, 1997, which date began the 90-day period for issuance of an order.

Upon review of the motion papers and pleadings, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to consider petitioner's claim that imposition of the compensating use tax on goods originally imported from Israel violates the United States Constitution.

II. Whether the United States-Israel Free Trade Area Implementation Act of 1985 precludes New York State from imposing the compensating use tax on goods brought into New York by petitioner.

III. Whether the Division of Taxation is guilty of selective enforcement of section 1110 of the Tax Law which imposes a compensating use tax.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner, Barbara P. Billauer, a Notice of Determination, dated November 20, 1995, assessing tax due in the amount of $202.51 plus penalty in the amount of $100.00 and interest of $25.89 for a total amount due of $328.40. The tax due was estimated in accordance with Tax Law § 1138. The computation section of the notice contains the following explanation of the assessment:

> "Section 1101(b)(7) of the New York State Sales and Use Tax Law, in part, defines 'use' as 'the exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage, or any keeping or retention for any length of time . . . .'
>
> "Based on the above, use tax is imposed on the items purchased by you outside of New York State and subsequently brought through U.S. Customs, in accordance with Section 1110 of the New York State Sales and Use Tax Law."

2. Following a conciliation conference in the Bureau of Conciliation and Mediation Services, the Division issued a Conciliation Order sustaining the Notice of Determination. Petitioner then filed a petition with the Division of Tax Appeals which was received on January 24, 1997.

3. On February 24, 1997, the Division served petitioner with a Notice of Motion for an Order to Dismiss Petition and a Motion for Summary Determination sustaining the Notice of Determination. It does not appear that any motion papers were filed with the Division of Tax Appeals at that time. The Division's answer to the petition was filed on April 2, 1997, and a copy of the motion papers previously served on petitioner was filed with the Division of Tax Appeals on April 3, 1997.

4. On or about March 24, 1997, petitioner served the Division with a Notice of Cross-Motion and an affirmation of petitioner who is also an attorney. Petitioner did not file her

cross-motion with the Division of Tax Appeals as required by section 3000.5(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

5. The Division of Tax Appeals became aware of petitioner's cross-motion when, on April 24, 1997, it received the Affirmation of Michael B. Infantino, Esq., in opposition to petitioner's cross-motion. By letter dated May 6, 1997, Daniel J. Ranalli, Assistant Chief Administrative Law Judge, informed petitioner of the requirement that all motions and responses to motions be filed with the Division of Tax Appeals. He then gave petitioner one week to file a response to the Division's original motion. On May 13, 1997, petitioner filed a copy of her cross-motion and a letter addressing statements made in Mr. Infantino's affirmation in opposition to the cross-motion.

6. In their respective affirmations, petitioner and the Division agree that the operative facts of this case are not in dispute. Petitioner, a resident of New York State, brought certain items of tangible personal property into the United States from Israel. The petition identifies these items as books, religious items, crafts and clothing. The United States Customs Service, in accordance with an agreement between it and the Division, informed the Division of petitioner's importation of goods and of the approximate value of the goods imported.[1] Based on that information, the Division assessed a compensating use tax.

7. Petitioner challenges the imposition of the compensating use tax on items of tangible personal property she brought into New York State from Israel. She articulates three grounds in support of her position. First, petitioner claims that the imposition of the tax violates the import-export clause of the United States Constitution and is arbitrary and capricious. Second, petitioner claims that the imposition of the tax violates treaty agreements between the United States and Israel and is in restraint of trade. Finally, petitioner claims that the agreement between the United States Customs Service and New York State fosters illegal selective enforcement.

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[1]Apparently, the United States Customs Service has agreed to notify the Division of the import of goods into New York by New York residents. Information regarding the exact nature or content of the agreement has not been placed in the record.

8. The Division seeks dismissal of the petition and a summary determination in its favor. It contends that petitioner's claim that the New York State Tax Law is preempted by the United States Constitution constitutes a facial attack upon the constitutionality of the compensating use tax statute and that the Division of Tax Appeals lacks jurisdiction to consider the constitutionality of legislative enactments.

9. In its affirmation in opposition to petitioner's cross-motion, the Division alleges that the trade agreement between the United States and Israel has no applicability to the tax at hand since the use tax is not imposed on the importation of tangible personal property into this State. Finally, the Division maintains that petitioner has not alleged any facts to support her claim of selective enforcement.

CONCLUSIONS OF LAW

A. The first issue to be addressed is whether the Division of Tax Appeals has jurisdiction to consider petitioner's claim that imposition of the compensating use tax violates the United States Constitution. As relevant here, Tax Law § 1110(a) provides as follows:

> "Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed, on every person a use tax for the use within this state . . . of any tangible personal property purchased at retail" (emphasis added).

Petitioner claims that the imposition of the use tax where the tangible personal property in question was brought into the United States from Israel is prohibited by the import-export clause of the United States Constitution. The Division seeks dismissal of petitioner's claim on the ground that it constitutes a challenge to the facial constitutionality of section 1110 of the Tax Law and that such a challenge is beyond the jurisdiction of the Division of Tax Appeals.

It is well established that the Division of Tax Appeals does not have the authority to determine the constitutionality of a legislative enactment (see, Matter of Unger, Tax Appeals Tribunal, March 24, 1994; Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). I disagree, however, that petitioner's argument constitutes such a challenge. Petitioner does not dispute the validity of the statute on its face, but argues that the Constitution bars the application of the statute under the circumstances that exist here, i.e., where the items

being used in New York State were originally imported from Israel. Accordingly, I conclude that the Division of Tax Appeals has jurisdiction to determine petitioner's claim and deny the Division's motion to dismiss the petition for lack of subject matter jurisdiction. To the extent that the Division's motion for a summary determination in its favor is also based on subject matter jurisdiction, it also must be denied.

B. Since I have found that subject matter jurisdiction exists, petitioner's motion for a summary determination in her favor can now be addressed. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(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 material and triable issue of fact."

"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, on remand 111 AD2d 138, 489 NYS2d 970, 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, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). Although the facts of this case are sparse, they are not in dispute. The parties agree about the relevant facts; neither party has alleged that any material issue of fact exists; and there are no factual issues that require resolution before the legal issues can be resolved. Therefore, a determination may be issued upon motion without a hearing.

"Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion" (20 NYCRR 3000.9[b][1]). Although the Division did not cross move for a summary determination on the merits of the case, I conclude that it is entitled to a determination sustaining the Notice of Determination issued to petitioner.

C. Initially, I find that the import-export clause of the United States Constitution is not implicated here. As pertinent, the import-export clause prohibits any State from laying "any imposts or Duties on Imports or Exports" (US Const, art I, § 10, cl [2]). The use tax is not a tax on imports or exports. It has been described as a tax "on the privilege of ownership or possession in the storage, use or consumption of tangible property within the taxing area" (Matter of Niagara Junc. Ry. Co. v. Creagh, 2 AD2d 299, 303, 154 NYS2d 299, affd 3 NY2d 831, 166 NYS2d 74, quoted in Matter of Datascope Corp. v. Tax Appeals Tribunal, 196 AD2d 35, 608 NYS2d 562, 564). Its purpose is to complement the sales tax by taxing property used in New York under circumstances that prevent the imposition and collection of sales tax (Matter of Datascope Corp. v. Tax Appeals Tribunal, supra, 608 NYS2d at 564). The import-export clause prohibits discriminatory state taxation based on the foreign origin of goods; it does not give imported goods immunity from nondiscriminatory taxes imposed without regard to foreign origin (Michelin Tire Corp. v. Wages, 423 US 276, 46 L Ed 2d 495, 503). Inasmuch as the use tax is uniformly imposed without regard to the origin of the goods, assessment of the use tax against petitioner is not prohibited merely because the tangible personal property which petitioner possesses and uses in New York State was brought here from Israel.

I reject petitioner's claim that imposition of the use tax on goods she brought into the United States through customs is a "backdoor" imposition of a duty on imported goods. Carried to its logical extreme, petitioner's argument would prevent New York from imposing sales or use taxes on any tangible personal property of foreign origin. Obviously, that result is unacceptable.

D. Petitioner's contention that the Division is seeking to collect a tariff on goods

imported from Israel is rejected. The fact that the United States Customs Service provided the Division with relevant information that resulted in an assessment of use tax cannot transform the use tax into a tariff. Free trade agreements between the United States and Israel are not affected by the imposition of the use tax on petitioner.

E. Petitioner's claim of selective enforcement is not supported by any facts or even allegations of fact. It too is without merit.

F. The petition of Barbara P. Billauer is denied; summary determination is granted in favor of the Division; and the Notice of Determination, dated November 20, 1995, is sustained.

DATED: Troy, New York
July 24, 1997

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE