STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAD ENERGY CORP.	:	DETERMINATION DTA NO. 818902
for Redetermination of a Deficiency or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period December 1, 1997 through April 30, 1998.	:	
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Petitioner, RAD Energy Corp., c/o Carl S. Levine, Esq., Carl S. Levine & Associates, P.C., 125 Jericho Turnpike, Jericho, New York 11753, filed a petition for redetermination of a deficiency or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the period December 1, 1997 through April 30, 1998.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 16, 2002 at 10:45 A.M., with all briefs due by April 28, 2003, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Carl S. Levine & Associates, P.C. (Carl S. Levine, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

ISSUE

Whether petitioner's application for a refund of petroleum business tax on the basis of a bad debt was properly denied by the Division of Taxation.

FINDINGS OF FACT

1. During the period in issue, petitioner, RAD Energy Corporation ("RAD"), was registered as a petroleum business as defined in section 300(b) of the Tax Law.

2. From December 1997 through April 1998, RAD sold gasoline to Bayview Fuel Oil, Inc. ("Bayview"). The fuel was delivered to fuel trucks controlled by Bayview and then resold and delivered to retail service stations in New York State.

3. The service stations did not pay Bayview for the diesel fuel or gasoline and, in turn, Bayview did not pay RAD.

4. Petitioner filed an Application for Refund of the Petroleum Business Tax Because of a Bad Debt. The application, which was dated July 17, 2000, sought a refund of petroleum business tax for the period December 1, 1997 through April 30, 1998 in the amount of $407,090.85.[1] Petitioner's application included RAD's income tax return for the year 1998 which claimed a deduction for a bad debt in the amount of $2,227,585.00. The refund application also included a series of documents regarding a petition for bankruptcy that had been filed by Bayview. Petitioner was at the top of Bayview's list of creditors holding the largest unsecured claims.

5. Prior to ruling on the application for a refund, the Division of Taxation ("Division") reviewed Bayview's operation in order to determine if Bayview was an operator of filling stations. After examining the Division's files pertaining to Bayview and the description of Bayview's operation in the bankruptcy plan, the Division concluded that there was no indication that Bayview operated any filling stations, and therefore petitioner did not satisfy the statutory

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[1] On its face, the application states that it is for the period January 1, 1998 through December 31, 1998. However, an examination of the documents which accompany the application shows that the period at issue is December 1, 1997 through April 30, 1998.

criterion for a refund. Since the Division concluded that the transactions did not qualify, it did not investigate the ultimate disposition of the fuel in order to determine whether the fuel was delivered to filling stations.

6. In a letter dated November 3, 2000, the Division advised petitioner that its claim for refund was denied. The letter explained that in order to qualify for a refund, the motor fuel must have been:

> 1) included in the reports filed by such petroleum business and all the taxes must have been paid and
>
> 2) sold in bulk to a purchaser for such purchaser's own use and consumption or sold to a filling station.

The Division concluded that the claim for refund failed the second requirement because the product was purchased for resale and the resale was not to a filling station operated by Bayview.

7. RAD was involved in various businesses. It owned terminals, it purchased and resold petroleum products, it operated service stations and it sold to commercial accounts. It may have been the largest supplier of petroleum products to New York City and many New York State agencies.

8. On January 1, 2001, RAD sold most of its operating assets to Sprague Energy which had its headquarters in Portsmouth, New Hampshire.

9. Petitioner maintained a terminal facility in Oceanside, New York. Initially, RAD acquired one terminal from Sunoco and another terminal from Exxon. At some point in time, the terminals were connected and they were operated as one terminal.

10. In or about 1995, one of RAD's marketing vice presidents secured Bayview as a customer. From approximately 1995 through 1998, RAD sold Bayview home heating oil, diesel fuel and gasoline from its terminal in Oceanside.

11. In the beginning, Bayview paid its bills promptly. At some point, the account receivable from Bayview began rising quickly and the checks or wire transfers were dishonored because of insufficient funds. This prompted RAD to stop selling to Bayview.

12. RAD filed an application for a credit or refund of sales and use taxes on the basis of those sales to Bayview for which it had not been paid. This application was granted. RAD also filed an application for a refund of prepaid motor fuel tax under Article 12-A of the Tax Law on the same basis. The claim was denied by the Division because there is no statutory authority for such a refund. For the same reason, the denial of the claim for a refund was upheld in ***Matter of RAD Energy Corporation*** (Tax Appeals Tribunal, September 12, 2002).

SUMMARY OF THE PARTIES' POSITIONS

13. In its brief, petitioner argues that the Division is collaterally estopped from relitigating or contesting the factual findings of the Tribunal in its prior decision regarding RAD. In particular, petitioner relies upon the statement in the prior decision that "All of the fuel was delivered directly to retail service stations in New York State." (***Matter of RAD Energy Corporation, supra.***) Petitioner also argues that the fuel sold to Bayview was to filling stations as contemplated by the Tax Law and, as such, RAD is entitled to the refund. According to petitioner, Bayview was merely a conduit for the filling stations to obtain the fuel, and the filling stations were the real consumers and users of the fuel.

14. In response, the Division acknowledges that RAD met the first and third requirements for a refund under Tax Law § 301-l. However the Division contends that petitioner did not meet

the second requirement for a refund. The Division maintains that in order to meet the second requirement, Bayview would have had to purchase the fuel for its own use or consumption or would have had to operate a filling station. Here, it is clear that Bayview purchased the fuel for resale and that it did not operate a filling station. Therefore, the second criterion has not been satisfied. The Division further maintains that the doctrine of collateral estoppel is inapplicable because the previous case dealt with an entirely different issue and the Division did not have the opportunity to litigate the issue presented in this matter. The Division also contends that accepting petitioner's argument that the second requirement was satisfied would result in the second requirement's becoming a nullity.

CONCLUSIONS OF LAW

A. The issue in this matter concerns the interpretation of Tax Law § 301-l(a). This section allows a registered petroleum business a refund of certain taxes when the transfer of its product results in a worthless debt under the following circumstances:

> where (i) such gallonage has been included in the reports filed by such petroleum business or aviation fuel business and all the taxes under this article with respect to such gallonage have been paid by such business, (ii) such gallonage was sold in-bulk by such petroleum or aviation fuel business to a purchaser for such purchaser's own use and consumption and (iii) such sale gave rise to a debt which became worthless, as that term is used for federal income tax purposes, and where such debt is deducted as a worthless debt for federal income tax purposes for the taxable year covering the month in which such refund claim relating to such debt is filed. Provided, however, for the purposes of this section, a sale of motor fuel and enhanced diesel motor fuel to a filling station shall be deemed to be a sale in-bulk for such filing station's own use and consumption . . . .

B. Initially, petitioner contends that the Division is bound by collateral estoppel by the findings of fact set forth in the Tribunal's decision in ***RAD Energy Corporation (supra)***. The Division disputes the applicability of this doctrine.

C. Collateral estoppel is a doctrine which precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding which was decided against that party or those in privy (***Buechel v. Bain***, 97 NY2d 295, 740 NYS2d 252, 257; ***Ryan v. New York Telephone Co.***, 62 NY2d 494, 478 NYS2d 823). The doctrine is applicable to the determinations of administrative agencies provided they are rendered pursuant to the adjudicatory authority of the agency and the agency uses procedures which are comparable those employed in a court of law (***Ryan v. New York Telephone Co.***, 62 NY2d 494, 478 NYS2d 823, 825-826, ***supra***). In order to invoke the doctrine of collateral estoppel, two requirements must be satisfied: (1) there must be an identity of issue which has necessarily been decided in the earlier action and which is controlling of the present action and, (2) there must have been a full and fair opportunity to contest the decision which is claimed to be determinative (***see***, ***Buechel v. Bain***, 97 NY2d 295, 303-304, 740 NYS2d 252, 257, ***supra***; ***Gilberg v. Barbieri***, 53 NY2d 285, 291, 441 NYS2d 49, 51). The burden of proof is upon the proponent of collateral estoppel to establish that the issues are identical and decisive (***Buechel v. Bain***, 97 NY2d 295, 303-304, 740 NYS2d 252, 257, ***supra***; ***Ryan v. New York Telephone Co.***, 62 NY2d 494, 478 NYS2d 823, 827, ***supra***). Conversely, the burden of proof is upon the opponent to show the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (***id***).

D. The prior ***RAD*** case arose from the same series of transactions which led to the issue presented here. That is, Bayview failed to pay RAD for the gasoline and diesel fuel which were sold to Bayview. RAD filed a claim for a refund of motor fuel tax which was denied by the Division because Article 12-A did not have a provision which allowed a distributor a credit or refund for prepaid motor fuel tax when the distributor is not paid for the motor fuel. Thus, the issue presented was whether there was statutory authority in Article 12-A that allowed a refund

of motor fuel tax for bad debts. Ultimately, the Division prevailed before the Tax Appeals Tribunal because there was no statutory authority which allowed a refund of motor fuel tax for bad debts. Thus, the issue which was resolved in the earlier RAD case was a pure question of law and the factual question of where the gallons were delivered had no bearing on the resolution of the case.

E. In contrast with the prior matter, Tax Law article 13-A unquestionably permits a refund of petroleum business tax under certain conditions. The issue presented now is whether the statutory criteria for permitting a refund have been satisfied. Viewed from this perspective, it is readily evident that there is no identity of issue and that there was never a full and fair opportunity to litigate the issue which is presented here. Therefore, petitioner's reliance upon the doctrine of collateral estoppel is completely without merit.

F. Petitioner points out that Tax Law § 301-l states that a "refund shall be allowed" to an Article 13-A taxpayer where the fuel was sold in-bulk for the purchaser's own use and that "a sale of motor fuel and enhanced diesel motor fuel to a filling station shall be deemed to be a sale in-bulk for such filling station's own use and consumption. . . ." Petitioner submits that the statute does not say that when there is a sale to a filling station the registered petroleum business must have made the delivery directly to the filling station rather than selling to a sub-distributor who then made the delivery. According to petitioner, this is why the finding of the Tax Appeals Tribunal in the prior ***RAD*** case is so significant. Petitioner submits that a productive view of this section would take into account the use of sub-distributors and jobbers. According to petitioner since the product was delivered directly to service stations, the spirit of the statute has been satisfied.

G. The foregoing argument is also without any merit. Petitioner's argument is based upon where the motor fuel is delivered. However, the statute focuses upon the party to whom the gasoline is sold. A refund is permitted under the statute to a petroleum business which imports motor fuel into this State, reports and pays tax on such motor fuel, and then (i) *sells* the motor fuel in-bulk to a purchaser who uses and consumes the motor fuel or (ii) *sells* the motor fuel to a filling station. The fact that the motor fuel was ultimately delivered to a filling station is simply irrelevant. Further, contrary to the argument raised at the hearing, there is nothing in the legislative history of Tax Law § 301-l which supports the position taken by petitioner.

H. Petitioner's argument that the failure to permit a refund will result in placing the burden of the tax on the wrong party must also be rejected. It is within the providence of the Legislature to determine when to permit a refund of tax (***see, Matter of RAD Energy Corporation, supra***).

I. The petition of RAD Energy Corp. is denied.

DATED: Troy, New York
September 11, 2003

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE