STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of	:	
MORAN TOWING CORPORATION	:	DETERMINATION DTA NOS. 820673 AND 820674
for Redetermination of Deficiencies or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Periods September 1, 1990 through June 30, 2001 and February 1, 2002 through January 31, 2003.	:	

Petitioner, Moran Towing Corporation, 50 Locust Avenue, New Canaan, Connecticut 06840, filed petitions for redetermination of deficiencies or for refund of tax on petroleum businesses under Article 13-A of the Tax Law for the periods September 1, 1990 through June 30, 2001 and February 1, 2002 through January 31, 2003.

On April 18, 2006 and April 19, 2006, respectively, petitioner, by its representative, Robert D. Plattner, Esq., and the Division of Taxation, by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), consented to have this controversy determined upon a stipulation of facts and the submission of documents without a hearing. All briefs were to be submitted by December 20, 2006, which date began the six-month period for the issuance of this determination. After due consideration of the entire record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to determine whether the petroleum business tax is unconstitutional on its face.

II. Whether ***Matter of Moran Towing Corporation v. Urbach*** (99 NY2d 443, 757 NYS2d 513) is determinative of the issues presented in this matter.

III. Whether the petroleum business tax violates the Commerce Clause of the United States Constitution.

FINDINGS OF FACT

Petitioner, Moran Towing Corporation ("Moran"), and the Division of Taxation ("Division") entered into a Stipulation of Facts which has been adopted as Findings of Fact "1" through "14". Attached to the stipulation are certain documents referenced in the stipulation and submitted by the joint agreement of the parties.

1. Moran Towing Corporation is a New York corporation.

2. Moran Towing & Transportation Co., Inc., was a New York corporation wholly owned by Moran Towing Corporation. On December 31, 1996 Moran Towing & Transportation Co., Inc., was merged into Moran Towing Corporation.

3. For all relevant periods, New York has imposed a tax on petroleum businesses under Article 13-A of the Tax Law.

4. The tax on petroleum businesses is imposed under Tax Law § 301-a "upon every petroleum business for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state . . . ."

5. The Article 13-A tax is imposed on, *inter alia*, fuel purchased outside the State that is brought into the State by the purchaser for its own consumption, as well as fuel purchased in New York and used in New York.

6. Moran has operated a towing service in New York Harbor for almost 140 years.

7. During the periods September 1, 1990 through June 30, 2001 and February 1, 2002 through January 31, 2003 ("Refund Periods"), Moran purchased fuel outside the State of New York, some portion of which was brought into New York in the fuel tanks of its vessels and consumed by Moran in the State.

8. During the Refund Periods, Moran reported and remitted tax to New York on its consumption of fuel purchased outside New York and consumed in New York as required under Article 13-A.

9. Moran remitted the following amounts of taxes for the periods indicated, as follows:

PERIOD	AMOUNT OF TAX
September 1, 1990 - June 30, 2001	$1,215,516.82
February 1, 2002 - February 28, 2002	14,574.47
March 1, 2002 - March 31, 2002	12,390.14
April 1, 2002 - April 30, 2002	13,346.54
May 1, 2002 - May 31, 2002	12,466.59
June 1, 2002 - June 30, 2002	14,005.92
July 1, 2002 - July 31, 2002	14,207.58
August 1, 2002 - August 31, 2002	12,787.72
September 1, 2002 - September 30, 2002	12,845.26
October 1, 2002 - October 31, 2002	10,409.53
November 1, 2002 - November 30, 2002	9,606.03
December 1, 2002 - December 31, 2002	9,606.03
January 1, 2003 - January 31, 2003	12,179.57

10. Moran filed timely refund claims (identified by the Division as refund claim numbers FT01080370, FT03030687, FT03030686, FT03030685, FT03030684, FT03030683,

FT03030682, FT03030681, FT03030680, FT03030679, FT03030678, FT03030677 and FT03030676) with respect to all of the taxes paid during the Refund Periods.

11. Refunds for the period September 1, 1990 through February 28, 1997 were denied in full in correspondence dated February 27, 1998.

12. Refund claims for all of the other Refund Periods were denied in full in notices dated August 24, 2004.

13. Moran filed timely petitions in the Division of Tax Appeals with respect to all of the refund denials issued for the Refund Periods.

14. The Division of Taxation filed timely answers to the petitions filed by Moran.

CONCLUSION OF LAW

A. The legislative history of New York State's tax on petroleum businesses begins in 1980, three years prior to the enactment of Article 13-A.[1] In that year, the State enacted a new franchise tax on certain oil companies (L 1980, ch 271; Tax Law § 182). The legislation contained a "no pass-through" provision, which stated that "the tax . . . shall be a liability of the oil company . . . and shall not be included, directly or indirectly, in the sales price of its products sold in this state." Tax Law § 182 was followed by Tax Law § 182-a (L l981, ch 481) and Tax Law § 182-b (L 1983, ch 18), the latter in response to litigation contesting the constitutionality of Tax Law § 182, in particular its "no pass-through" provision.

In 1983, Tax Law §§ 182, 182-a and 182-b were replaced with Article 13-A of the Tax Law (L 1983, ch 400). The petroleum business tax imposes a tax on "every petroleum business, for the privilege of engaging in business, doing business, employing capital, owning or leasing

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[1]The legislative history of New York State's tax on petroleum businesses is explained in ***Matter of Moran Towing Corporation v. Urbach*** (99 NY2d 443, 757 NYS2d 513). The history set forth above was obtained largely from that decision.

property, or maintaining an office in this state . . . .” (Tax Law § 301[a][1]). A petroleum business was defined to include “every corporation and unincorporated business formed for, engaged in or conducting the business, trade or occupation of importing or causing to be imported (by a person other than one which is subject to tax under this article) into this state for sale in this state, or extracting, producing, refining, manufacturing, or compounding petroleum” (Tax Law § 300). In 1984, an amendment to the petroleum business tax (L 1984, ch 67) extended the tax to businesses importing petroleum for their own consumption. The definition of “petroleum business” in Tax Law § 300 was expanded to include every corporation and unincorporated business regularly engaged in importing or causing to be imported petroleum into the State for its own consumption. In addition, the activities taxable under Tax Law § 301 were expanded to include the consideration given or contracted to be given for petroleum imported into the State by a business for its own consumption (Tax Law § 301[a][1][ii]).

From 1984 through August of 1990, an annual “privilege tax” was imposed on each petroleum business calculated as a percentage of “the consideration given or contracted to be given by it for petroleum . . . which it imported or cause to be imported . . . into this state for consumption by it in this state” (Tax Law § 301[a][1][ii]). The statute further provides that a “[a] petroleum business, which brings petroleum into this state in the fuel tank connecting with the engine of a vessel propelled by the use of such petroleum” shall receive a credit equal to the amount of gallons of fuel purchased in New York against the total gallons consumed by the business in New York (Tax Law § 301[c]).

Since September 1990, the “privilege tax” is a monthly tax calculated on a cents-per-gallon basis (***see***, Tax Law § 301-a). The statute provides that “fuel brought into this state in the fuel tank connecting with the engine of a vessel propelled by the use of such motor fuel shall be

deemed to constitute a taxable use of motor fuel . . . to the extent that the fuel is consumed in the operation of the vessel in this state" (Tax Law § 301-a[b][2]; ***see***, Tax Law § 301-a[c][1][B]). Section 301-a also provides a credit for the fuel a petroleum business has purchased in New York (***see***, Tax Law § 301-a [b][2]; [c][1][B]).

These statutes reflect the amendments enacted in 1997 in response to ***Matter of Tug Buster Bouchard Corporation v. Wetzler*** (217 AD2d 192, 635 NYS2d 803, ***affd*** 89 NY2d 830, 653 NYS2d 271) which declared Tax Law § 301(a)(1)(ii) unconstitutional. The 1997 amendments added Tax Law § 301(c); § 301-a (b)(2) and § 301-a (c)(1)(B) (***see***, L 1997, ch 389, § 1, part A, §§ 153, 154). Section 301(c) was to apply retroactively to April 1, 1984, and the amendments to section 301-a were to apply retroactively to September 1, 1990 (***see***, L 1997, ch 389, § 1, part A, § 219[24], [25]).

B. In June of 1998, Moran filed a verified petition pursuant to Article 78 of the Civil Practice Laws and Rules ("CPLR") in Albany Supreme Court seeking to overturn the Department of Taxation and Finance's decision denying its request for a refund of taxes paid under Article 13-A of the Tax Law for the period September 1, 1990 through February 28, 1997. Moran also challenged, as facially unconstitutional under the Commerce Clause (US Const, art I, § 8[3]), those portions of Tax Law §§ 301 and 301-a imposing a tax on fuel imported by a vessel for its consumption within the state while engaged in interstate commerce. Petitioner further contested the Legislative's retroactive application of the 1997 amendments to the petroleum business tax.

Subsequently, several other corporations operating vessels in New York Harbor, including Eklof Marine Corporation ("Eklof"), moved to intervene in the proceeding initiated by Moran. In March 1999, Justice James B. Canfield granted their motion.

In May 1999, Supreme Court granted the Commissioner of Taxation and Finance's motion to dismiss the petition for failure to exhaust administrative remedies. The court also found that the 1997 amendments to the petroleum business tax creating a retroactive adjustment to the Tax Law did not contravene the Due Process Clause of the 14th Amendment to the United States Constitution. On appeal, the Appellate Division reversed and declared the tax on the consumption of fuel in section 301(a)(1)(ii) and section 301-a(b)(2) and (c)(1)(B) of the Tax Law facially unconstitutional under the Commerce Clause (***Matter of Moran Towing Corp. v. Urbach***, 283 AD2d 78, 726 NYS2d 748). The Appellate Division noted that petitioner and intervenors were being taxed on the consumption of fuel that had not "been removed from the stream of interstate commerce" and had not "come to rest" within New York. The Court found that the challenged statute was unconstitutional because it artificially imposed a substantial nexus with New York, such "that an activity previously identified as simple interstate movement is now, without more, 'deemed to constitute a taxable use'." The Department of Taxation and Finance appealed.

Ultimately, the Court of Appeals reversed the Appellate Division's determination that the relevant sections of the petroleum business tax were facially unconstitutional (***Matter of Moran Towing Corporation v. Urbach***, 99 NY2d 443, 757 NYS2d 513).

The Court initially noted that the intervenors were making a facial challenge to the constitutionality of the petroleum business tax, and in order to prevail, they must surmount the presumption of constitutionality accorded to legislative enactments by proof "beyond a reasonable doubt," citing ***LaValle v. Hayden*** (98 NY2d 155, 747 NYS2d 125). The party mounting a facial constitutional challenge bears the substantial burden of demonstrating "that 'in any degree and in every conceivable application,' the law suffers wholesale constitutional

impairment" (***Cohen v. State of New York***, 94 NY2d 1, 8, 698 NYS2d 574). In other words, "the challenger must establish that no set of circumstances exists under which the Act would be valid (***United States v. Salerno***, 481 US 739, 745). (***Moran Towing Corporation v. Urbach***, ***supra***.)

The Court noted that early United States Supreme Court decisions held that states were unable to impose direct taxes on interstate commerce (***see, e.g., Helson v. Kentucky***, 279 US 245). This line of reasoning has subsequently evolved to recognize that interstate commerce can be made to bear its portion of state taxes (***see, Complete Auto Tr., Inc. v. Brady***, 430 US 274). The Court further noted that there is currently a four-prong test in place to determine whether a state tax imposed upon interstate commerce will survive a challenge under the Commerce Clause. The validity of the tax will be upheld "[1] when the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State" (***Complete Auto Tr., Inc. v. Brady***, ***supra***). The Court stated that the only portion of the ***Complete Auto*** test at issue was whether a substantial nexus could exist between New York and the activity to which the statutes at issue apply. (***Moran Towing Corporation v. Urbach***, ***supra***.)

The intervenors' primary argument was that the fuel consumed in interstate commerce can never have a nexus with a taxing state because it does not "come to rest" within the state. For this argument, the intervenors relied on a series of cases decided prior to ***Complete Auto***. The Court noted that this line of cases, decided at a time when states were prevented from taxing interstate commerce directly, drew a distinction between an approved tax on the withdrawal of fuel from storage for use in interstate commerce and a tax on the mere consumption of fuel in interstate commerce, which at that time was seen to be unconstitutional. According to the Court,

the Supreme Court of the United States had since determined that whether items remained "in the stream of interstate commerce" or "came to rest" within the state "may be of some importance for other purposes . . . but for Commerce Clause analysis it is largely irrelevant" (***D.H. Holmes Co. Ltd. v. McNamara***, 486 US 24, 31). The Court concluded that the Appellate Division erred when it applied the pre-***Complete Auto*** cases to the case at hand. (***Matter of Moran Towing Corporation v. Urbach***, ***supra***.)

The Court reviewed the cases which previously addressed what constitutes a substantial nexus for the purpose of Commerce Clause analysis in the context of sales and use taxes (***see***, ***Matter of Orvis Co. v. Tax Appeals Tribunal***, 86 NY2d 165, 630 NYS2d 680, ***cert denied*** 516 US 989). In ***Orvis***, the Court examined the development of Supreme Court jurisprudence concerning the type of nexus required before a state could impose a valid tax on interstate commerce. According to the Court, that development culminated with the Supreme Court's decision in ***Quill Corp. v. North Dakota*** (504 US 298), and held that the substantial nexus portion of the ***Complete Auto*** test requires the physical presence within the state of the entity being taxed. The Court noted that "[w]hile a physical presence . . . is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence'" (***Matter of Orvis v. Tax Appeals Tribunal***, 86 NY2d at 178, 630 NYS2d 680, quoting ***National Geographic Society v. California Board of Equalization***, 430 US 551). Moreover, "the required nexus with the taxing state need not necessarily be directly related to the activity being taxed, but [could] simply [be] whether the facts demonstrate some definite link, some minimum connection, between the [the taxing state and] the person . . . it seeks to tax" (***Matter of Matter of Orvis v. Tax Appeals Tribunal***, 86 NY2d at 174, 630 NYS2d 680). (***Moran Towing Corporation v. Urbach***, ***supra***, at 517.)

After finding support from several decisions from other states which have addressed the nexus prong of the ***Complete Auto*** test (***see e.g. Western Md. Ry. Co. v. Goodwin***, 167 W.Va. 804, ***appeal dismissed sub nom Western Md. Ry. Co. v. Rose***, 456 US 952; ***Hartley Mar. Corp. v. Mierke***, 196 W.Va. 669, ***cert denied sub nom Hartley Mar. Corp. v. Paige***, 519 US 1108; ***Atchison, Topeka & Santa Fe Ry. Co. v. Blair***, 338 NW2d 338 [Iowa], ***cert denied*** 465 US 1071), the Court concluded that the ***Complete Auto*** test is the appropriate test to determine whether the statutes at issue violate the Commerce Clause. The Court added that the decisions from the other states, which were consistent with its decision in ***Orvis***, supported the conclusion that physical presence of a business in this state is sufficient to constitute a "substantial nexus" with the State under ***Complete Auto***. The Court concluded that the fact that the tax is measured by the consumption of fuel within the State does not alter the State's authority to tax the privilege of doing business in New York. (***Moran Towing Corporation v. Urbach***, ***supra***, at 518.)

The Court held that the facial constitutional challenge to the petroleum business tax must fail because there is a set of circumstances under which the statute would be valid, stating that a sufficient nexus would exist where the entity was, for example, a New York corporation, with offices in the state, employing New York citizens and conducting business in the state. According to the Court, this set of facts would constitute physical presence that is more than a "slightest presence" in New York. The Court therefore concluded that a substantial nexus could exist such that the first prong of the ***Complete Auto*** test would be satisfied and the statute could survive a facial constitutional challenge (***Moran Towing Corporation***, ***supra***).

C. In its brief, petitioner first argues that the Court of Appeals decision in ***Moran*** does not address the constitutional claims it is raising here. Petitioner explains that when it first

pursued its constitutional claims in an Article 78 proceeding, it was joined by several other towing companies as intervenors. Following the Supreme Court's conclusion that petitioner and the intervenors had failed to exhaust their administrative remedies, the intervenors appealed, while petitioner did not. On appeal, the intervenors did not assert the constitutional Commerce Clause claims raised by petitioner in its verified petition, but instead relied upon a line of cases decided prior to ***Complete Auto***. Petitioner's constitutional claims allege discrimination against interstate commerce, not a lack of nexus.

Petitioner next claims that Article 13-A of the Tax Law, as it existed during the Refund Periods, discriminates on its face against interstate commerce in two distinct ways in violation of the Commerce Clause of the United States Constitution. First, petitioner points out that Tax Law § 300(b) defined petroleum business to include persons importing fuel for self-use, but excluded persons using fuel that had been the subject of a retail sale in the state. As a result, petitioner argues, tax was imposed under Tax Law § 301-a on fuel imported for self-use but not on fuel purchased in New York for self-use. Secondly, petitioner notes that under Tax Law §§ 300(b) and 301-a, the Article 13-A tax is imposed on a whole range of business activities at various stages in the manufacture, wholesale distribution and retail sale of fuel. Section 301-a, however, contains a "multiple activities" exemption, which forbids taxation of the same fuel more than once. Petitioner argues that the Supreme Court has concluded on more than one occasion that a multiple activities exemption of this kind facially discriminates against interstate commerce because it impermissibly favors the consolidation of business activities within the home state.

Petitioner notes that the Supreme Court has delineated three conditions necessary for a valid compensatory tax to exist. First, a state must, as a threshold matter, identify the intrastate tax burden for which the state is attempting to compensate. Second, the tax on interstate

commerce must be shown roughly to approximate - but not exceed - the amount of the tax on intrastate commerce. Finally, the events on which the intrastate and interstate taxes are imposed must be sufficiently similar in substance to serve as mutually exclusive proxies for each other (***Fulton v. Faulkner***, 516 US 325). Petitioner argues that the petroleum business tax fails the second and third prongs of the three-part test. Petitioner notes that Article 13-A imposes tax on fuel imported for self-use but not on fuel purchased in New York for self-use, thus imposing a higher tax on imported fuel than on intrastate fuel, failing the second prong of the Supreme Court's three-prong test. According to petitioner, New York's compensatory tax scheme is flawed because of the assumption that vendors subject to Tax Law §§ 300(b) and 301-a(c) will pass along the full amount of the tax in each instance to their customers. Thus, it is argued by petitioner that as this assertion is speculative, and unless it were always true, in-State sellers of domestic petroleum are benefitted while it and other importers like it are burdened by New York's taxing scheme.

Petitioner argues that the petroleum business tax is imposed upon a whole range of business activities that take place at various stages in the manufacture, wholesale distribution and retail sale of fuel. While taxing in-State activities at various stages of this vertical chain of production and distribution, the tax forbids taxation of the same fuel more than once (Tax Law § 301-a[c]). According to petitioner, the New York taxing scheme favors intrastate economic interests at the expense of their out-of-state counterparts by creating an incentive for taxpayers to consolidate their activities in a single state so as to minimize their aggregate tax burden. Thus, the multiple activities exemption of the petroleum business tax discriminates not only against users of imported fuel such as petitioner, but against out-of-state manufacturers and wholesalers as well.

D. In response to the foregoing, the Division argues that the Division of Tax Appeals lacks jurisdiction to determine the constitutionality of a statute on its face which is the sole challenge raised by petitioner. It also argues that the doctrine of *stare decisis* requires that the ***Moran Towing Corporation*** decision be followed.

E. Petitioner, in its presentation to the Supreme Court and in its argument to the Division of Tax Appeals, and the Division, in its arguments to the Division of Tax Appeals, have each pointed out that the challenge to the petroleum business tax is based on questioning the constitutionality of the law on its face.[2] As argued by the Division, the Division of Tax Appeals does not have jurisdiction to determine the constitutionality of a statute on its face. The principle was recently reiterated in ***Matter of Eisenstein*** (Tax Appeals Tribunal, March 27, 2003) wherein the Tribunal stated:

> The Division of Tax Appeals is a forum of limited jurisdiction and is not authorized to determine the facial constitutionality of statutes (***Matter of J.C. Penney Co.***, Tax Appeals Tribunal, April 27, 1989; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988). However, the Division may determine whether tax law statutes are constitutional as applied (***see, Matter of David Hazan, Inc.,*** Tax Appeals Tribunal, April 21, 1988, ***confirmed Matter of David Hazan, Inc. v. Tax Appeals Tribunal*** , 152 AD2d 765, 543 NYS2d 545, ***affd*** 75 NY2d 989, 557 NYS2d 306).

Here, the arguments raised by petitioner are clearly facial challenges to the statute. The decision of the Court of Appeals in ***Moran Towing Corporation*** treated similar arguments as legal issues not warranting an administrative hearing. Thus, the arguments that the petroleum business tax is invalid *per se* because it discriminates on its face against interstate commerce in violation of the Commerce Clause; that the petroleum business tax does not meet the requirements of a valid compensatory tax; and that the retroactive credit provision does not cure the claimed petroleum

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[2]Although the parties may not, by agreement, confer or diminish the jurisdiction of the Division of Tax Appeals, it is noted that petitioner's reply brief did not challenge the Division's argument that the Division of Tax Appeals did not have jurisdiction.

business tax's constitutional infirmity as an invalid compensatory tax are all arguments which may not be considered by the Division of Tax Appeals.

F. The petitions of Moran Towing Corporation are denied.

DATED: Troy, New York
May 3, 2007

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE