STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ATLAS VAN LINES, INC.	:	DETERMINATION DTA NOS. 823490
for Revision of Determinations or for Refund of Highway Use Tax under Article 21 of the Tax Law for the Period August 1, 1998 through April 30, 2003.	:	AND 823491

Petitioner, Atlas Van Lines, Inc., filed two petitions for revision of determinations or for refund of highway use tax under Article 21of the Tax Law for the period August 1, 1998 through April 30, 2003.

On January 20, 2011 and January 24, 2011, respectively, petitioner, appearing by Bond, Schoeneck & King, PLLC (Richard L. Smith, Esq., and Frank C. Mayer, Esq., of counsel) and the Division of Taxation, appearing by Mark F. Volk, Esq. (Michael B. Infantino, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs submitted by June 20, 2011, which date began the six-month period for issuance of this determination. By letter to the parties, dated November 28, 2011, the Administrative Law Judge extended the time for issuance of this determination for three months pursuant to Tax Law § 2010(3). After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner qualified for the exemption from highway use tax provided for in Tax Law § 504(5) for the period in issue based upon vehicles used exclusively in the transportation of household goods.

II. Whether the definition of "household goods" applicable to this matter included those items described in Transportation Law § 2(15)(b) and (c).

FINDINGS OF FACT

The parties entered into a stipulation, dated January 24, 2011, which provided that the only issue in dispute was whether the shipments of articles described in Transportation Law § 2(15)(b) and (c) qualify for the "household goods" exemption in Tax Law § 504(5). Petitioner conceded all other issues with regard to the Division of Taxation's audit, which led to the issuance of the two notices of determination, and the Division of Taxation (Division) agreed to waive the penalties asserted in those notices.

In addition, in performing the audit, the Division became aware of the fact that petitioner sometimes paid tax on shipments of household goods described in Transportation Law § 2(15)(b) and (c). If petitioner prevails herein, all tax determined to be due on those shipments will be cancelled and any tax paid on the same will be refunded or credited. If the Division prevails, the parties agreed that petitioner would be liable for tax on the Transportation Law § 2(15)(b) and (c) shipments and accorded a credit for any taxes paid on same.

1. During the period in issue, August 1, 1998 through April 30, 2003 (audit period), Atlas Van Lines, Inc. (Atlas) was engaged in the business of interstate transportation of household goods and other items for a fee. Atlas specialized in household moving, offering a number of moving services for interstate distance moves.

2. The Division of Taxation (Division) conducted an audit of the books and records of Atlas for the audit period, resulting in the issuance of two notices of determination dated June 29, 2009. The first notice, notice number L-032254638-9, asserted additional highway use tax in the sum of $120,828.59 plus penalty and interest for the period August 1, 1998 through July 31, 2002. The second, notice number L-032254750-9, asserted additional highway use tax in the sum of $26,493.18 plus penalty and interest for the period August 1, 2002 through April 30, 2003.

3. At the heart of the dispute in this matter is the definition of "household goods" and each party's interpretation of that term. During the audit period, petitioner utilized five commodity code definitions to determine taxability for purposes of the highway use tax. Those codes described commodities as follows:

Commodity Code 1: personal effects and property used or to be used in a dwelling when a part of the equipment or supply of such dwelling and similiar property; except property moving from a factory or store; except such property as the householder has purchased with intent to use in his dwelling and which is transported at the request of, and the transportation charges paid to the carrier by, the householder.

Commodity Code 2: furniture, fixtures, equipment, and the property of stores, offices, museums, institutions, hospitals or other establishments when a part of the stock, equipment, or supply of such stores, offices, museums, institutions, hospitals, or other establishments and similar property; except the stock-in-trade of any establishment, whether consignor or consignee other than used furniture and used fixtures, except when transported as incidental to moving of the establishment, or a portion thereof, from one location to another.

Commodity Code 3: articles, including objects of art, displays, and exhibits, which because of their unusual nature or value require the specialized handling and equipment usuallly employed in moving household goods and other similar articles; except an article, whether crated or uncrated, which does not, because of its unusual nature or value, require the specialized handling and equipment usually employed in moving household goods.

Commodity Code 4: new household goods and products not included in Code 1, i.e., property moving from a factory or store not purchased directly by the householder, and store fixtures.

Commodity Code 5: general commodities (i.e. all other commodities not included in the foregoing definitions).[1]

4. The Division agreed that commodity code 1 shipments qualified for the household goods exemption in Tax Law § 504(5) and petitioner conceded that commodity code 4 and 5 shipments did not. The parties disagree as to whether commodity code 2 and 3 shipments qualified for the exemption, framing the only issues left in dispute.

5. At two separate times during the audit, the Division consulted with the New York State Department of Transportation (DOT) to determine the proper definition of household goods. In response to the Division's March 18, 2004 letter, Attorney Robert A. Rybak expressed the opinion of the DOT that the Interstate Commerce Commission Termination Act of 1995, Pub L 104-88, (ICCTA) had preempted Transportation Law § 2(15)(b) and (c) and excluded those items from the definition of household goods for New York purposes. Attorney Rybak added that it

[1]It is noted that commodity codes 1, 2 and 3 are, with minor immaterial differences, identical to the definition of household goods found in Transportation Law § 15(b) and (c), respectively.

was the position of the DOT that only those items in Transportation Law § 2(15)(a) were, by definition, household goods.

Attorney Rybak reiterated this position in a letter to the Division dated September 18, 2008, in response to another Division inquiry, stating that "it is the Department's position that the ICC Termination Act of 1995 effectively pre-empted the Department from regulating the goods described in [§ 2(15)(b) and § 2(15)(c)] as household goods."

6. The Rybak response to the March 18, 2004 Division letter attached a Notice sent by the Commissioner of DOT, John Daly, to holders of certificates to transport household goods in New York that advised them of the change in the federal law definition of household goods and that such federal change preempted the New York definition. He informed these transporters that they would have until August 31, 1996 to apply for a second certificate to haul "property" other than household goods, the description of which remained in Transportation Law § 2(15)(b) and (c). The Commissioner's Notice attached a copy of an Order, Case T-31732, an official explanation of the change and the DOT's interpretation of the preemptive operation of the ICCTA, which was to serve as a substitute for the new certificate to haul property until August 31, 1996. By that date, all motor carriers that wished to transport property other than household goods were required to have applied for and received a certificate to do so.

7. Mr. Rybak's opinion was consistent with the December 13, 2004 statement of New York Transportation Commissioner John C. Egan, who, in his comments on the Federal Aviation Administration Authorization Act of 1994,[2] Pub L 103-305, effective January 1, 1995, noted that

[2]The Act specifically preempted state economic regulation of motor carriers by prohibiting any state from enacting any law or regulation related to price, route or service of any motor carrier with respect to the transportation of property, except household goods.

the most significant aspect of the new federal law was that carriers would no longer be required to file transportation rates and territory and commodities would no longer be limited.

In a separate document entitled "Implementation of the Federal Aviation Administration Authorization Act of 1994 by New York State Department of Transportation, Commercial Transport Division, December 13, 1994," the DOT noted that the federal legislation was consistent with the DOT's transition from a system of economic regulation to a noneconomic regulatory system that issues authority to all carriers that comply with safety and insurance standards and has no distinction between common and contract carriage.

8. The application for authority to transport household goods issued subsequent to the Commissioner's Notice stated that the ICCTA had preempted the DOT's authority to regulate the route rates and services of that part of household goods described in section 2(15)(b) and (c) of the Transportation Law.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner argues that it is entitled to the exemption from highway use tax provided in Tax Law § 504(5) on its vehicular usage that transported household goods during the audit period, arguing that it utilized a definition of "household goods" that was almost identical to the definition found in the New York Transportation Law and regulations, which it contends is the only tenable definition remaining after the Interstate Commerce Commission (ICC) was eliminated in 1995.

10. Petitioner does not believe that the definition of "household goods" by the successor agency to the ICC**,** the Surface Transportation Board, has any bearing on this matter and that the doctrine of federal preemption is not applicable to the definition of household goods for purposes of the Tax Law. In addition, petitioner argues that the Tax Law was clear as to what the

definition of household goods was, i.e., either as defined by the commissioner of DOT or the ICC. Since the latter no longer existed, the former definition, which comported with petitioner's own commodity codes (1, 2 and 3), was applicable for the audit period. Petitioner maintains that the definition remained unchanged in both the New York Transportation Law and the regulations thereunder, notwithstanding DOT's opinion of counsel or a commissioner's notice.

11. The Division of Taxation maintains that ICCTA redefined household goods in a more restrictive fashion and that this definition preempted the portion of Tax Law § 504(5) that defined the term for New York purposes. The Division believes that while the Act may not expressly preempt the prior definition, it so thoroughly occupied the legislative field that it is reasonable to make the inference that Congress left the states no room to supplement it.

12. The Division argues that even if the Tax Law definition has not been preempted by the ICCTA definition, then the commissioner of DOT has redefined the term "household goods" to conform to the ICCTA definition and that definition must be applied herein. In relying on the commissioner of DOT, the Division maintains that it has reasonably deferred to the expertise of another agency with the knowledge and understanding of the transportation industry, which is charged with the regulation of that industry.

13. The Division contends that petitioner has not met its burden of proof to show that the definition it relied on was not preempted. The Division notes that petitioner had to show that its interpretation of the exemption was the only reasonable one and the Division believes it has not done so.

14. Petitioner responds to the Division's arguments noting that the ICCTA specifically addresses interstate and not intrastate shipments and as such cannot be said to affect the shipments in issue or the New York State definition of household goods for that purpose. It

further maintains that it has met its burden of proof in that it has demonstrated that the definition of "household goods" by the DOT is still in effect and has never been legally changed, underscoring the fact that an opinion of the DOT counsel's office and a notice from the commissioner addressed to a limited number of carriers did nothing to the statutory and regulatory definitions.

CONCLUSIONS OF LAW

A. Tax Law § 503(1) imposes a highway use tax

> for the privilege of operating any vehicular unit upon the public highways of [New York State] and for the purpose of recompensing the state for the public expenditures incurred by reason of the operations of such vehicular unit on the public highways of [New York].

B. Tax Law § 504(5) provides for an exemption from the tax imposed by Tax Law § 503(1) for vehicular units

> Used exclusively in the transportation of household goods (as defined by the commissioner of transportation of this state or the interstate commerce commission) by a carrier under authority of the commissioner of transportation of this state or of the interstate commerce commission.

C. A party seeking an exemption, like the one contained in Tax Law § 504(5), must prove that it is entitled to it "because an exemption is not a matter of right, but is allowed only as a matter of legislative grace" (***Grace v. State Tax Commission***, 37 NY2d 193, 371NYS2d 715, 717 [1975], ***lv denied*** 37 NY2d 708, 375 NYS2d 1027 [1975]). In this instance, the measure of petitioner's entitlement to the exemption is whether it can show that its interpretation of the exemption in Tax Law § 504(5), particularly the definition of the term "household goods", is the only reasonable interpretation or that the Division's interpretation is unreasonable (***Matter of Grace v. New York State Tax Commn.***; ***Matter of Marriott Family Rests. v. Tax Appeals***

Tribunal, 174 AD2d 805, 570 NYS2d 741 [1991], ***lv denied*** 78 NY2d 863, 578 NYS2d 877 [1991]; ***Matter of Aero Mayflower Tr. Co. v. State Tax Commn.***, 144 AD2d 198 [1988]).

D. Petitioner believes that its interpretation of the term "household goods" is the only reasonable interpretation and that the Division's interpretation is unreasonable, thus entitling it to the exemption. Up until January 1, 1996, Tax Law § 504(5) relied on the definitions of the term provided by the now-defunct ICC and Transportation Law § 2(15). Both of the aforementioned sections provided (and the Transportation Law still provides) that the term "household goods" means:

> (a) personal effects and property used or to be used in a dwelling when a part of the equipment or supply of such dwelling and such other similar property as the commissioner may provide by regulation; except that this paragraph shall not be construed to include property moving from a factory or store, except such property as the householder has purchased with intent to use in his or her dwelling and which is transported at the request of, and the transportation charges paid to the carrier by, the householder;
>
> (b) furniture, fixtures, equipment, and the property of stores, offices, museums, institutions, hospitals or other establishments when a part of the stock, equipment, or supply of such stores, offices, museums, institutions, hospitals, or other establishments and such other similar property as the commissioner may provide by regulation; except that this paragraph shall not be construed to include the stock-in-trade of any establishment, whether consignor or consignee, other than used furniture and used fixtures, except when transported as incidental to moving of the establishment, or a portion thereof, from one location to another; and
>
> (c) articles, including objects of art, displays, and exhibits, which because of their unusual nature or value require the specialized handling and equipment usually employed in moving household goods and such other similar articles as the commissioner may provide by regulation; except that this paragraph shall not be construed to include any article, whether crated or uncrated, which does not, because of its unusual nature or value, require the specialized handling and equipment usually employed in moving household goods.[3] (Transportation Law § 2[15]; 17 NYCRR 800.1[f]; 49 USC § 10102 former [11][A], [B], [C].)

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[3]The federal definition of household goods differed only in that the word "commissioner" was replaced by the word "Commission."

However, the ICCTA, effective January 1, 1996, abolished the ICC and its definition of household goods. In its place it provided a new definition, which provided that:

> The term "household goods", as used in connection with transportation, means personal effects and property, used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is - -
>
> (A) arranged and paid for by the householder, including transportation of property from a factory or store when the property is purchased by the householder with the intent to use in his or her dwelling, or
>
> (B) arranged and paid for by another party. (49 USC § 13102[10].)

Essentially, the definition contained in the ICCTA restricted the meaning of household goods to the first paragraph of the former federal definition and the current Transportation Law provision (Transportation Law § [2][15][a]). The reason for the change in the definition of household goods was to deregulate office and trade show moves. (HR Conf Rep 104-422.)

Immediately after the enactment of Public Law 104-88, the New York Commissioner of Transportation, John Daly, issued a notice to holders of certificates to transport household goods in New York that advised them of the change in the federal law definition of household goods and that such federal change preempted the New York definition. He informed these transporters that they would have until August 31, 1996 to apply for a second certificate to haul "property" other than household goods, the description of which remained in Transportation Law § 2(15)(b) and (c). The Commissioner's Notice attached a copy of an Order, Case T-31732, an official explanation of the change and the DOT's interpretation of the preemptive operation of the ICCTA, which was to serve as a substitute for the new certificate to haul property until August 31, 1996. By that date, all motor carriers that wished to transport property in addition to household goods were required to have applied for and received a certificate to do so.

The application for authority to transport household goods issued subsequent to the Commissioner's Notice stated:

> The ICC Termination Act of 1995 has preempted this Department's authority to regulate the route rates and services of that part of household goods described in Section 2(15)(b) and (c) of the Transportation Law. These sections are commonly referred to as commercial shipments (b) and shipments requiring the care and handling normally associated with household goods moves (c).
>
> If you are applying for authority as a household goods carrier and it is granted, you will have authority to transport residential shipments.
>
> In order to transport commercial shipments or the shipments requiring special handling, you must file a second application for property, except household goods. A $50.00 application fee is also required.
>
> If you already have permanent authority as a household goods carrier, then you have already been grandfathered in as a property carrier. A separate notice dated February 29, 1996, in Case 31732 was sent to all existing household goods carriers advising them of this fact.

Therefore, prior to August 31, 1996, all current motor carriers of household goods and all future applicants for certificates of authority to transport household goods were made aware of the DOT's interpretation of the change in the definition resulting from the enactment of the ICCTA. There is no evidence that any motor carrier or motor carrier association instituted any action against either the commissioner or the DOT to challenge the commissioner's interpretation of the preemptive effect of the ICCTA definition of household goods or his subsequent actions to enforce it. Further, even though petitioner claims it did not receive the notice of the change and the reason therefor, it did become aware of the change in definition as soon as it applied for its certificates to carry household goods and other property. It knowingly chose not to challenge the commissioner's interpretation that the ICCTA had preempted New York law and acquiesced in the new definition.

E. Under the Supremecy Clause of the United States Constitution, any state law that conflicts with a federal law is pre-empted (US Const, art VI ["[t]his Constitution, and the Laws of the United States . . . shall be the supreme law of the Land . . . and the Judges in every State shall be bound thereby . . ."]; ***see Gibbons v. Ogden***, 22 US 1 [1824]). As a general rule, a finding of preemption is not favored, absent persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained (***Delta Airlines, Inc. v. New York State Div. of Human Rights***, 229 AD2d 132 652 NYS2d 253 [1996], ***affd*** 91 NY2d 65, 666 NYS2d 1004 [1997]). Federal law preempts state or local law in three ways: express preemption language in a federal statute; pervasive federal regulation occupying the field, leaving no room for state or local legislation; or irreconcilable conflict with the federal statutory scheme (***Mayor of the City of New York v. Council of the City of New York***, 4 Misc 3d 151, 780 NYS2d 406 [1999]).

Congress, in an act concerned with the administration of interstate transportation and carriers, revised its definition of household goods to deregulate office and trade show moves. The rationale for such deregulation was to subject the transportation of such property to fewer regulations to spur competition and produce higher productivity and lower prices.

Whether this "conflict" with New York State law was the reason the commissioner of DOT believed the New York definition of household goods had been preempted and immediately changed it was not disclosed, and the opinion expressed by attorney Rybak of the DOT's Division of Legal Affairs merely reiterated the DOT's position that the ICCTA preempted the definition of household goods in Transportation Law § 2(15) without elaborating on the reasons therefor, other than saying that the Order in Case T-31732, February 29, 1996, accurately reflected the DOT's position.

What remains, however, is the fact that the commissioner effectively modified the New York definition of household goods as of January 1, 1996, and motor carriers have been operating under this new definition ever since -- one which is consistent with the federal definition and carries out the Congressional intent to deregulate the transportation of property other than household goods as described in Transportation Law § 2(15)(b) and (c) (***see generally*** 17 NYCRR part 814 [regulations which pertain to household goods]).

This conclusion is reached after a review of the Congressional legislation passed prior to January 1, 1996, including the Federal Aviation Administration Authorization Act of 1994, Pub L 103-305. In that law, effective January 1, 1995, Congress emphatically deregulated the transport of property, other than household goods, and expressly preempted any state laws or regulations that contradicted that aim (***see Kelley v. U.S.***, 69 F3d 1503, 1505 [10th Cir 1995]).

In stating its purpose, Congress declared that:

> (1) the regulation of intrastate transportation of property by the States . . . (A) has imposed an unreasonable burden on interstate commerce; (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and (C) placed an unreasonable cost on the American consumers; and (2) certain aspects of the state regulatory process should be preempted (Pub L No. 103-305).

Moreover, 49 USC § 11501(a) expressly preempted state economic regulation of motor carriers by prohibiting any state from enacting or enforcing any law or regulation related to a price, route or service of any motor carrier with respect to the transportation of property, with the exception of household goods (49 USC § 11501[h][1], [2][B]; ***New York State Motor Truck Assn. v. Pataki***, US Dist Ct, SD NY, 03 Civ 2386, Dec. 17, 2004).

This preemption was immediately communicated in a letter dated December 13, 1994 to all motor carriers by New York State Transportation Commissioner John C. Egan, who noted that the most significant aspect of the new federal law was that carriers would no longer be

required to file transportation rates and territory and commodities would no longer be limited. He reiterated the exclusion of household goods. Commissioner Egan explained to motor carriers that the change was economic, and that safety, insurance, vehicle size and weight issues were not affected and would remain within the authority of the New York State DOT.

In a separate document entitled "Implementation of the Federal Aviation Administration Authorization Act of 1994 by New York State Department of Transportation, Commercial Transport Division, December 13, 1994," the DOT noted that the federal legislation was consistent with the DOT's transition from a system of economic regulation to a noneconomic regulatory system that issues authority to all carriers that comply with safety and insurance standards and has no distinction between common and contract carriage.

Given this legislative background, the context within which Commissioner Daly interpreted the ICCTA in 1996, enacted less than one year later, becomes more clear and narrow. It provides a more expansive explanation of the House Conference Report's reference to the change in the definition of household goods "to deregulate office and trade show moves." It also explains why Congress did not feel the need to provide a more in-depth reason for the change, having just enacted a law aimed at deregulating the intrastate transportation of property. It merely added to the definition of property subject to the deregulation of the Federal Aviation Administration Authorization Act of 1994. Reading the two acts together, it is clear that the federal and state objectives to transition from a system of economic regulation to a noneconomic regulatory system was consistent with interpreting the ICCTA definition of household goods as a furtherance of the deregulation begun in the Federal Aviation Administration Authorization Act of 1994 and preempting the Transportation Law and regulations, which thwarted that intent.

F. In fact, the Commissioner of DOT did conclude that the federal act had preempted Transportation Law § 2(15)(b) and (c) and the regulation at 17 NYCRR 800.1(f) and immediately notified motor carriers who held certificates of authority to haul household goods. The commissioner then notified all other motor carriers of the change in the definition of household goods when they applied for a certificate of authority to haul household goods after December 13, 1994.

The Tax Law exemption to the highway use tax defines household goods as the definition of the New York Commissioner of Transportation or the ICC (Tax Law § 504[5]). Given the Commissioner's unchallenged action with respect to the definition of household goods, the complicity of household goods and property carriers, and the clear Congressional intent to deregulate the transport of goods described in Transportation Law § 2(15)(b) and (c), it is concluded that the term "household goods" must be construed to include the items described in Transportation Law § 2(15)(a) only.

> In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" [citations omitted]. ***(Majewski v. Broadalbin-Perth Central School District***, 91 NY2d 577, 673 NYS2d 966, 968 [1998].)

This is not to say that this determination is finding or concluding that the ICCTA preempted the Transportation Law. Rather, the conclusion reached herein is that the Commissioner of DOT reasonably defined the term "household goods" as those goods contained in Transportation Law § 2(15)(a) and the exemption to highway use tax provided for in Tax Law § 504(5) must rely on that definition, notwithstanding the current provisions of Transportation Law § 2(15) and the regulation at 17 NYCRR 800.1(f).

> Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. (***Kurcsics v. Merchants Mutual Insurance Company***, 49 NY2d 451, 426 NYS2d 454, 458 [1980].)

Therefore, petitioner has not demonstrated that its interpretation of the language of the exemption in Tax Law § 504(5) was the only reasonable interpretation or that the Division's interpretation is unreasonable (***Matter of Grace v. New York State Tax Commn***.; ***Matter of Marriott Family Rests. v. Tax Appeals Tribunal***) and has failed to sustain its burden herein.

G. The petitions of Atlas Van Lines, Inc., are denied and the notices of determination, dated June 29, 2009, are sustained, subject to the agreement of the parties more fully set forth in the stipulation, dated January 24, 2011.

DATED: Troy, New York
February 9, 2012

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE