SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, BRIAN SPOON, D/B/A SPOON TRUCKING, STEVE BIXLER, JACK MCCOMB and LEWIE PUGH,

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

NEW YORK STATE DEPARTMENT OF TAXATION AND F IANNCE, et al.,

Defendants.

Index No. 5551-13
RJI 01-13-111950

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Plaintiff, Owner Operator Independent Driver's Association (OOIDA), and several OOIDA members, Bryan Spoon d/b/a/ Spoon Trucking, Steve Bixler, Jack McComb and Lewi Pugh (referred to herein together as Plaintiffs), are seeking class certification to challenge the $15.00 registration fee, and the $4.00 decal fees imposed under the Highway Use Tax provisions of Article 21 of the New York State Tax Law. Plaintiffs seek declaratory and injunctive relief to prevent the imposition of these "taxes, damages for alleged violations of their Civil Rights pursuant to 42 USC §1983, and a refund of all monies paid by them, and others similarly situated, under the disputed statutory provisions. Defendants' CPLR 3211 motion to dismiss on the pleadings was denied, in substantial part, by order dated January 28, 2014 (Teresi, J.) finding, *inter alia*, that plaintiff's commerce claims, asserted under the Supreme Court determination in *American Trucking Association, Inc. v Scheiner* (483 US 266, 284), were facially viable, and that the federally Section 1983 claims were viable to the extent that plaintiffs were seeking injunctive relief. [1]

Currently pending is plaintiffs' motion for class certification to represent a class consisting of: "All interstate motor carriers as defined in Tax Law §502(5); (a) who reside outside the State of New York; and (b) who have paid the Registration Fee and Decal Fee challenged in this action and are now or may in the future become subject to the requirements of Tax Law §502(a) and hence liable for the per vehicle payment of the

[1] Only Plaintiff's due process claim was dismissed on the pleading.

$15.00 Registration Fee and the $4.00 Decal Fee imposed by Tax Law §§ 502 (1)(a) and 502 (6)(a) (*See* Notice of Motion, ¶1). Defendants oppose this motion.

Factual Background

According to the Complaint (*see* Scott Aff., Exhibit A), OOIDA is a not-for profit Missouri corporation with members in 50 States. Plaintiffs are individual members of OOID. Plaintiff Spoon is a resident of North Carolina. Plaintiff Bixler is a resident of Pennsylvania. Plaintiff McComb is a resident of Colorado, and plaintiff Pugh is a resident of Ohio. The individual plaintiffs allege that they operate trucking businesses throughout the United States. Plaintiffs allege that in order to do business in New York State, they have to pay a registration fee pursuant to Tax Law §502(1)(a), and a decal fee pursuant to Tax Law §502(6)(a).

The Subject of the Lawsuit

Section 502 of the Tax law is part of the Highway Use Tax provisions outlined under Article 21 of the New York State Tax Law. As noted in Plaintiffs' Complaint, the highway use tax is "... levied and imposed… for the privilege of operating any vehicular unit upon the public highways of this state and for the purpose of recompensing the state for the public expenditures incurred by reason of the operations of such vehicular units on the public highways of this state." (Tax L. §503[1]). This tax is levied upon

> …any automobile, truck, tractor or other self-propelled device, having a gross weight in excess of eighteen thousand pounds, or any truck having an unloaded weight in excess of eight thousand pounds, or any tractor, having an unloaded weight in excess of four thousand pounds, which is used upon the public highways

(Tax L. §501[2][a]). Persons responsible for the tax are "carriers" of the vehicles (*Id*) defined as, "any person having the lawful use or control, or the right to the use or

control of any vehicular unit in this state" (Tax L. §501[5]). Where the carrier is not the owner of the vehicle, the statute imposes joint and several liability on the owner, and the carrier, for payment the use tax (Tax L. §503[1]). The amount of the highway use tax is calculated, "based upon the gross weight of each motor vehicle and the number of miles it is operated on the public highways in this state" (*Id*). In order to identify the vehicles subject to the tax, the State requires "carriers" to register each motor vehicle operated or to be operated on the public highways in this state for a fee of $15.00 per vehicle (Tax L. §502 [1][a]), or purchase obtain a more limited 72 hour "trip certification" for $24.00 (Tax L. §502 [1][c]). As proof of registration, pursuant to the disputed provision under Tax Law §502(6)(a), the Commissioner requires the use of decals as evidence that a carrier has a valid certificate of registration for each motor vehicle operated or to be operated on the public highways of this state. Certificate of Registration decals cost $4.00, and must be "…conspicuously affixed upon the motor vehicle for which it is issued as closely as practical to the registration or license plates and at all times be visible and legible." (*Id*). Plaintiffs refer to these fees as "taxes"(see Complaint ¶¶ 2-3). Plaintiffs assert that because the registration and decal fees are not apportioned, they violate the United States Constitution, Art. I, § 8 Commerce Clause.

The Motion for Class Certification

In support of the current motion, plaintiff's submit the affirmation of the president of plaintiff Owner Operator Independent Driver Association (Owner Operator), who asserts that his organization represents over 150,000 truckers in the United States and Canada who collectively own approximately 240,000 heavy trucks and small truck fleets (*see* James Johnson Declar. ¶2). Mr. Johnson asserts that Owner Operator is on a mission

to protect the rights of truckers, and it has commenced litigation in approximately 30 states resulting in "refunds" of several hundred million dollars to truckers. Owner Operator asserts that its members, on average earn between $50,000 and $42,000 per year, and travel 300 nights a week and, therefore, do not have the time or resources to commence their own law suits (*Id* ¶6a). Also submitted are affidavits from counsel attesting to their class action litigation experience (*see* Cullen Aff., *passim*; Fallati declaration, *passim*).

Argument

POINT I

A CLASS ACTION IS NOT SUPERIOR TO ALL OTHER METHODS FOR FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY

The determination of whether a lawsuit qualifies as a class action under the statutory criteria "rests within the sound discretion of the trial court" (*City of New York v Maul*, 14 NY3d 499, 509 [2010], *citing Small v Lorillard Tobacco Co*., 94 NY2d 43, 52 [1999]). In this matter, however, petitioners' request for class action relief should be denied.

There are five criteria for determining whether to grant class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact that are common to the entire class which predominate over any questions that affect only individual members; (3) the claims or defenses of the representative petitioners typify those of the entire class; (4) the nominative petitioners will fairly and adequately protect the interests of the entire class; and (5) that alternatives are not available that are superior to a class action in terms of insuring a "fair and efficient

adjudication of the controversy" (*Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1045 [3d Dep't 2008]). "Each requirement is an essential prerequisite to class action certification" (*Alix v Wal-Mart Stores, Inc*., 57 AD3d at 1045, *quoting Small v Lorillard Tobacco Co*., 94 NY2d 43, 52 [1999]; *see also CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [2008]; *Lauer v New York Tel. Co*., 231 AD2d 126, 130 [1997]), and it is plaintiffs' burden to establish compliance with the statutory requirements for certification under CPLR §§ 901 and 902 (*Rallis v. City of New York*, 3 AD3d 525, 526 [2d Dep't 2004]) In this matter, plaintiffs cannot demonstrate that the fifth element, that a class action is the superior means to insuring a "fair and efficient adjudication of the controversy."

As a general rule, class action relief is not necessary when governmental operations are involved. (*Mahoney v Pataki*, 98 NY2d 45, 55 [1992]; *Martin v Levine*, 39 NY2d 72, 76 [1976]; *Legal Aid Society v New York City Police Department*, 274 AD2d 207 [1st Dep't 2000]). This "government operations rule" rests upon the logical premise that orders and judgments obtained in declaratory judgment actions will apply to all subsequent litigants through the principles of *stare decisis* (*see Rivers v Katz*, 67 NY2d 485, 499 [1986][holding that the trial court did not abuse its discretion in denying motion for class certification "since application of the principles of stare decisis will adequately protect subsequent litigants"]; *Martin v Lavine*, 39 NY2d 72, 75 [1976][stating that class relief is not necessary when government operations are involved and stare decisis will protect subsequent litigants]; *DeZimm v New York State Board of Parole*, 135 AD2d 66, 68 [3d Dept 1988]), and will dictate the actions of the subject agencies going forward. (*see Fairly v. Fahey*, 75 AD2d 158, 160 [3d Dept 1980], *vacated on other grounds*, 79

AD2d 35 [3d Dept 1981]; *Jamie B. v. Hernandez*, 274 AD2d 335, 336 [1st Dept 2000] [holding that "class action certification was inappropriate under the governmental operations rule, which presumes that the government will abide by court rulings in future cases involving similarly situated petitioners, under principles of stare decisis"]). This principal should be applied in this case.

The plaintiffs in this matter are seeking a declaration that the registration and decal fees are unconstitutional because they are not apportioned based upon the actual miles that out of state truckers drive in New York. Respondents do not believe that the $4.00 decal and $15.00 registration fees are unconstitutional. However, should plaintiffs prevail in this matter, the statutes they challenge will be stricken. Prospective relief, therefore, is automatic (*see Rivers v Katz*, 67 NY2d at 499).

The need for retrospective relief in this matter is similarly unsuited for class certification. The Department of Taxation and Finance is much better equipped, and has mechanisms already in place, to provide what in essence would be reimburse individuals or corporations who have paid registration and decal fees. It would be less effective, in fact to interject plaintiffs and their counsel as class "administrators" to oversee the distribution of a proposed fund, after the deduction of their legal and administrative fees (*Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 15 N.Y.3d 375 [2010][CPLR 909 is the codification of the common-law rule that attorneys' fees may be paid out of a fund created for the benefit of the class by the litigation, permits attorney fee awards… 'the representatives of the class'").

This is not a case involving "systemic deficiencies which seek widespread, systematic reform" (*c.f. compare Hurrell-Harring v. State of New York*, 81 AD3d 69, 75

(3d Dep't 2011). This case involves a simple question of whether New York State may charge a $15.00 registration fee. The same fee is charged for every registered carrier. It does not take complicated discovery, or multiple lawsuits in differing jurisdictions to determine whether a carrier was charged a registration fee and is entitled to reimbursement of those fees (*c.f. Hurrell-Harring v. State of New York*, 81 AD3d at 75). The "narrow" exception to the "government operations rule" that applies where the government or agency has a "demonstrated reluctance" to extend mandated relief to parties other than the individual plaintiffs before the court (*Legal Aid Society v New York City Police Dep't*, 274 A.D.2d 207, 213 [1st Dep't 2000], *citing Varshavsky v Perales*, 202 AD2d 155, 155-156 [1st Dept 1994]; *Mitchell v Barrios-Paoli*, 253 AD2d 281, 292[1st Dept 1999]), is inapplicable to this case because there is no evidence on the record that the agency, or the governor's office has disobeyed any lawful court directives. The Tax Department itself if fully equipped to provide such relief.

POINT II

PLAINTIFFS HAVE NOT ESTABLISHED THAT THERE ARE QUESTIONS OF LAW AND FACT COMMON TO THE CLASS WHICH PREDOMINATE OVER ANY QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS.

Plaintiff is seeking to represent a class consisting of:

> "All interstate motor carriers as defined in Tax Law §502(5); (a) who reside outside the State of New York; and (b) who have paid the Registration Fee and Decal Fee challenged in this action and are now or may in the future become subject to the requirements of Tax Law §502(a) and hence liable for the per vehicle payment of the $15.00 Registration Fee and the $4.00 Decal Fee imposed by Tax Law §§ 502 (1)(a) and 502 (6)(a)."

(*See* Notice of Motion, ¶1). With respect to this class, the president of plaintiff Owner Operator asserts that it has over 150,000.00 who own more than 240,000 heavy and small

fleet trucks, who are on the road 360 days a year, and who make only around $40,000 per year. Plaintiffs assert that, therefore, the fees impose an inordinate burden on them, and they do not have the time, or the money to litigate the matter themselves. These interests are not necessarily aligned with, for instance, with larger out-of-state carriers who own hundreds of trucks that go in and out of New York on a daily basis, or 72 hour pass holders who make infrequent trips into New York and pay flat per diem rates

It is not enough for plaintiffs to prove that issues exist that are common to the entire class, or even that they are substantial and significant. Plaintiffs must show that these issues predominate over unique circumstances that may well characterize each aggrieved Carrier's complaint (*see Alix v. Wal-Mart Stores, Inc*., 57 A.D.3d 1044, 1047 [3d Dep't 2008]; *Lieberman v 293 Mediterranean Mkt. Corp*., 303 AD2d 560, 561 [2003]; *Mitchell v Barrios-Paoli*, 253 AD2d 281, 291 [1999]). In this case, plaintiffs have failed to meet that burden.

POINT III

THE COMMENCEMENT OF AN ACTION ON BEHALF OF SIMILARLY SITUATED CARRIERS DOES NOT CONSTITUTE AN APPROPRIATE INDICIUM OF PROTEST BY EACH PROPOSED MEMBER OF THE CLASS

Plaintiffs in this action alleged that they are being unconstitutionally taxed. Generally, a tax voluntarily paid may not be recovered, in the absence of protest or duress (*City of Rochester v Chiarella*, 65 NY2d 92, 99; *Mercury Mach. Importing Corp. v City of New York*, 3 NY2d 418, 424-425 [1957]; *Adrico Realty Corp. v City of New York*, 250 NY 29). Thus, non-protesting taxpayers may not enhance their tax refund claims through the use of a class action. *See Conklin v. Southampton*, 141 A.D.2d 596, 597-598 [2d Dep't

1988], *quoting Gandolfi v City of Yonkers*, 101 AD2d 188 [2d Dept], *affd* 62 NY2d 995 [1984]["the Supreme Court properly denied the motions for class action certification"]).

As stated by the Court of Appeals in *Mercury Mach. Importing Corp. v City of New York* (3 NY2d 418 at 426): "The practical reason for holding payments of illegal taxes without protest to be voluntary…stems from problems of municipal finance. Where protest has been interposed, the municipality is notified that it may be obliged to refund the taxes and is required to be prepared to meet that contingency. If no protest has been lodged, it is generally assumed that taxes paid can be retained to meet authorized public expenditures, and financial provision is not made for contingent refunds" (*see also, Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, *mot to amend remittitur granted* 31 NY2d 678, *rearg denied* 31 NY2d 709). The rule is intended to prevent a person who paid the tax with knowledge that the tax may be invalid from later choosing to bring an action at a time when a declaration of invalidity might have a drastic impact upon the public fisc (*see, Paramount Film Distrib. Corp. v State of New York, supra; Adrico Realty Corp. v City of New York, supra*). This rule should be applied in this case, and plaintiffs' motion for class certification should be denied (*see e.g. Conklin v. Southampton*, 141 A.D.2d at 597-598).

CONCLUSION

For the reasons stated above, it respectfully is requested that plaintiff's application for class certification

Dated: Albany, New York
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