NO. CV 08 4016562S	:	SUPERIOR COURT
	:	
HOUSATONIC RAILROAD COMPANY	:	TAX SESSION
	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
	:	
PAM LAW, COMMISSIONER	:	
OF REVENUE SERVICES	:	JUNE 24, 2009

MEMORANDUM OF DECISION
ON DEFENDANT'S MOTION TO DISMISS

In this tax appeal, the plaintiff, Housatonic Railroad Company, Inc. (Housatonic) challenges the decision of the defendant, the commissioner of revenue services (commissioner), in refusing to make a refund of the sale of petroleum gross earnings tax that Housatonic claims it paid for the purchase of diesel fuel it used in the operation of its railroad system in Connecticut and Massachusetts.

The commissioner moves to dismiss this action on the grounds that this court lacks subject matter jurisdiction on the basis of sovereign immunity and that the plaintiff, for the purpose of taking an appeal pursuant to General Statutes § 12-597[1], is not a taxpayer.

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[1] General Statutes § 12-597 provides, in relevant part, that "[a]ny taxpayer aggrieved because of any order, decision, determination or disallowance of the Commissioner of Revenue Services made in relation to the tax imposed under section 12-587 may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom to the superior court for the judicial district of New Britain[.]"

In its complaint, the plaintiff alleges that Housatonic is a specially-chartered Connecticut railroad corporation operating a railroad exclusively as a common carrier of freight by rail within Connecticut and Massachusetts under the authority of the Surface Transportation Board and its predecessor agency, the Interstate Commerce Commission.[2]

During the period from July 1, 2003 through June 30, 2007, Housatonic purchased diesel fuel in Connecticut from Sack Distributors Corporation and its predecessor Stephen H. Sack, d/b/a Sack Distributors, in Hartford, Connecticut. The diesel fuel purchased from the distributor was used exclusively by Housatonic in its locomotives as part of its interstate freight rail business. The distributor remitted the petroleum gross earnings tax, in the amount of $100,176.91[3], to the commissioner.

The plaintiff further alleges in its complaint as follows:

> "8. Conn. Gen. Stat. [§] 12-587 (b) (2)[4] exempts diesel fuel sold to water carriers engaged in interstate commerce from the application of the Sale of Petroleum Products Gross Earnings Tax.

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[2] The Interstate Commerce Commission was abolished and its functions were transferred to the Surface Transportation Board effective January 1, 1996, pursuant to 49 U.S.C. § 702, Transportation.

[3] This amount was attributed to the purchase of diesel fuel by Housatonic and was paid to Sack Distributors by Housatonic.

[4] Although the plaintiff cites to General Statutes § 12-587 (b) (2) to support its allegation in paragraph (8), there is no mention of "water carriers engaged in interstate commerce" in this section.

"9. Conn. Gen. Stat. [§] 12-587 (b) (2) does not exempt diesel fuel sold to rail carriers engaged in interstate commerce from the application of the Sale of Petroleum Products Gross Earnings Tax.

"10. The Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) prohibits states from imposing any tax that directly or indirectly imposes a greater tax burden on rail carriers than the tax imposes on other modes of transportation in interstate commerce. 49 U.S.C. [§] 11501 (b) (4).

"11. The Sale of Petroleum Gross Earnings Tax imposed prior to July 1, 2007 by Conn. Gen. Stat. [§] 12-587 imposes a greater tax burden on rail carriers engaged in interstate commerce than it imposes on water carriers engaged in interstate commerce."

The plaintiff brings this appeal pursuant to General Statutes § 12-33 and § 12-587, as well as pursuant to 49 U.S.C. § 11501 (c), for enforcement of the prohibition of 49 U.S.C. § 11501 (b) (4).[5]

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[5] 49 U.S.C. § 11501, regarding tax discrimination against rail transportation property, provides, in relevant part, as follows:

"(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

General Statutes § 12-33, "Appeals from action of Commissioner of Revenue Services", comes within Chapter 201 dealing with appeals involving grants in lieu of taxes on state-owned property. The statute provides that "[a]ny town or company aggrieved by the action of the commissioner may, within one month from the time of such action, make application in the nature of an appeal therefrom to the superior court of the judicial district in which such applicant is located . . . ."

> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.
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> "(c) Notwithstanding [§] 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section —
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> (1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and
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> (2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

On the other hand, § 12-587, which is germane to the issue in this case, is controlled by § 12-597.[6]

It should be noted that, whereas § 12-33 requires an appeal to the Superior Court where the applicant is located, a concept attached to property tax appeals pursuant to General Statutes § 12-117a or § 12-119, § 12-587 actions must be returned to the Tax Session of the Superior Court located in New Britain pursuant to General Statutes § 12-39*l* which recites in relevant part that "(a) Except as otherwise provided by statute, 'tax appeal' means an appeal from an order, decision, determination or disallowance of the Commissioner of Revenue Services . . . ."

The commissioner now moves to dismiss this action on two grounds:

The first ground that forms a basis for the commissioner's motion to dismiss is that the state has sovereign immunity, and in order for Housatonic to maintain this suit against the commissioner, it must show some statutory authority allowing such an action.

The second ground that forms a basis for the commissioner's motion to dismiss is that, although the plaintiff claims that it is bringing this suit pursuant to § 12-33, the commissioner argues that§ 12-33 is inapplicable to this appeal because § 12-597 is the only statute permitting a taxpayer to appeal a decision of the commissioner relating to the petroleum gross earnings tax.

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[6] See footnote one.

When a statute focuses on a specific subject, such as a tax on the sale of petroleum products, such a statute should control over a more generalized statute such as § 12-33. "It is a well-settled principle of [statutory] construction that specific terms covering [a] given subject matter will prevail over general language of . . . another statute which might otherwise prove controlling." (Internal quotation marks omitted.) Griswold Airport, Inc. v. Madison, 289 Conn. 723, 729 n.10, 961 A.2d 338 (2008). See also Semerzakis v. Commissioner of Social Services, 274 Conn. 1, 18, 873 A.2d 911 (2005) ("[if] there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one case or subject within the scope of a general provision, then the particular provision must prevail; and if both cannot apply, the particular provision will be treated as an exception to the general provision" [internal quotation marks omitted]).

Since the plaintiff, in bringing this action, contends that it is a taxpayer within the meaning of § 12-587, the statutory authorization to appeal the commissioner's decision comes from § 12-597, not from § 12-33. Our courts have long held "that when a statute has established a procedure to redress a particular wrong, a person must follow the specified remedy and may not institute a proceeding that might have been permissible in the absence of such a statutory procedure." (Internal quotation marks omitted.) Jewett City Savings Bank v. Franklin, 280 Conn. 274, 279, 907 A.2d 67 (2006).

Sovereign immunity, as claimed by the commissioner, relates to the court having jurisdiction to decide the case. As the Supreme Court noted in DaimlerChrysler Corp. v. Law, 284 Conn. 701, 711, 937 A.2d 675 (2007), "[t]he principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Internal quotation marks omitted.)

The DaimlerChrysler court cites two exceptions in order to overcome the presumption of sovereign immunity: 1) the legislature, either expressly or by implication, statutorily waived the state's sovereign immunity and 2) the constitutional issues dealing with a declaratory action or an injunction. Id., 711-12. Since this case does not involve the second exception, the plaintiff must point to some statutory authority to maintain this action. In this regard, the plaintiff points out that § 12-33 and § 12-587 provide the legislative authority to bring this action.

However, § 12-587 is the only statute that deals with the sale of petroleum products that result in gross earnings that are taxed to the seller. In § 12-587 (b) (1), the relevant language that is applicable to this case provides that "any company which is engaged in the refining or distribution, or both, of petroleum products and which distributes such products in this state shall pay a quarterly tax on its gross earnings derived from the first sale of petroleum products within this state." It is important to note

that the plaintiff, as alleged in its complaint, is a consumer of petroleum products, specifically, diesel fuel for its locomotives. There is no allegation in the plaintiff's complaint that it is engaged in either the refining or the distribution of petroleum products.

In order for the plaintiff to survive a motion to dismiss, it is necessary for the court to determine "whether the facts as alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive a motion to dismiss on the ground of statutory immunity." Martin v. Brady, 261 Conn. 372, 376, 802 A.2d 814 (2002). As previously noted, the pleadings only allege that the plaintiff was a consumer of diesel fuel, not a distributor or refiner of the petroleum products described in § 12-587. Viewed in the light most favorable to the plaintiff, the pleadings do not support such a cause of action as claimed by the plaintiff.

Of key importance to the resolution of this motion to dismiss is the scope of the meaning of "gross earnings" in § 12-587. As noted by the Supreme Court in Texaco Refining & Marketing Co. v. Commissioner, 202 Conn. 583, 594-95, 522 A.2d 771 (1987), "[t]he legislature expressly described that purpose in General Statutes § 12-599 (a), which states: It is not the intention of the general assembly that the tax imposed under [§] 12-587 be construed as a tax upon purchasers of petroleum products, but that such tax shall be levied upon and be collectible from petroleum companies as defined in [§] 12-

587, and that such tax shall constitute a part of the operating overhead of such companies." (Internal quotation marks omitted.)

In summary, the plaintiff's claim seeking a tax refund arises from a legislative enactment, § 12-587. The legislature has enacted § 12-597 to provide a specific authorization for a taxpayer to challenge the commissioner's determination or disallowance relating to a claim arising under § 12-587. Section 12-597 provides that "[a]ny taxpayer aggrieved because of any order, decision, determination or disallowance of the Commissioner of Revenue Services made in relation to the tax imposed under section 12-587 may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom to the superior court for the judicial district of New Britain . . . ." Although the plaintiff claims to be the taxpayer in § 12-587, its claim only arises because it reimbursed its distributor for the taxes the distributor was obligated to pay under § 12-587.

As noted in Soracco v. Williams Scotsman, 292 Conn. 86, 91-92, _ A.2d _ (2009), "[i]t is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. . . . [Pleading] and proof of aggrievement are prerequisites to the trial court's jurisdiction over the subject matter of a plaintiff's appeal." (Citations omitted; internal quotation marks omitted.) The plaintiff's pleadings clearly put the railroad in the category of a consumer, not a taxpayer as defined in § 12-

587. As a consumer of petroleum products, the plaintiff has no standing to maintain this appeal.

Turning to the last issue raised by the plaintiff as a basis for taking this appeal, the plaintiff claims that the commissioner is in violation of the federal statute prohibiting tax discrimination against rail transportation property, as contained in 49 U.S.C. § 11501 (b) (4), supra. As noted above, the sale of petroleum gross earnings tax is not a tax on a railroad, as the plaintiff claims; it is a tax on the gross earnings of a seller of petroleum products. Clearly, this was spelled out in Texaco Refining & Marketing Co. v. Commissioner, supra.

In addition, a fair reading of § 11501 shows that this statute is inapplicable to the facts in this case because it refers to an ad valorem tax on railroad property, not a tax on the railroad's gross earnings. The court draws this conclusion for three reasons: first, because § 11501 (a) (1) defines the term "assessment" to mean "valuation for a property tax levied by a taxing district"; second, § 11501 (a) (3) defines the term "rail transportation property" to mean "property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part [49 U.S.C. §§ 10101 et seq.]" and third, § 11501 (b) defines acts that "unreasonably burden and discriminate against interstate commerce" as the right to "(1) [a]ssess rail transportation property at a value that has a higher ratio to the true market value of the rail

transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property."

True market value is a property tax assessment term. General Statutes § 12-63 (a) provides that "[t]he present true and actual value of all other property shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof . . . ." Clearly, a tax on gross earnings of a refiner or distributor of petroleum products is not an ad valorem tax.

In light of the allegations in the plaintiff's complaint, this court concludes that the plaintiff is not a taxpayer entitled to appeal the commissioner's action denying the plaintiff a refund of the petroleum gross earnings tax.

Accordingly, the commissioner's motion to dismiss is granted.

Arnold W. Aronson
Judge Trial Referee