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HOUSATONIC RAILROAD COMPANY, INC. *v.* COMMISSIONER OF
REVENUE SERVICES—DISSENT

EVELEIGH, J., dissenting. I respectfully dissent. I agree with parts I and II of the majority opinion. I respectfully disagree, however, with the majority's conclusion in part III of its opinion that the plaintiff, Housatonic Railroad Company, Inc., may not appeal pursuant to General Statutes § 12-33¹ because General Statutes § 12-597,² and not § 12-33, governs the plaintiff's appeal from the decision of the defendant, the commissioner of revenue services, denying the plaintiff's petroleum tax overpayment claim. Specifically, I disagree that the provisions of the petroleum tax chapter generally; General Statutes § 12-587 *et seq.*; and § 12-597 specifically, apply to the present appeal and bar the plaintiff from availing itself of the appeal procedure set forth in § 12-33. I would instead conclude that the plaintiff's claim is beyond the purview of the petroleum tax chapter, and, accordingly, that the plaintiff may appeal pursuant to § 12-33.

Like the majority, I acknowledge the governing legal principle that, “[t]o overcome the presumption of sovereign immunity . . . a plaintiff seeking to bring a claim against the state must establish that an exception to the doctrine applies.” (Citation omitted; internal quotation marks omitted.) The basis of my disagreement with the majority, however, stems from my conclusion that the plaintiff has established that such an exception exists, namely, § 12-33. I therefore conclude that the plaintiff, as a company aggrieved by an action of the defendant, has standing under § 12-33 to challenge the defendant's disallowance of its claim for overpayment, because the plaintiff's claim was based on its contention that the petroleum tax was applied to the plaintiff's purchases of petroleum fuel in violation of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R act), Pub. L. No. 94-210, 90 Stat. 31. Fundamental to this conclusion is my determination that the plaintiff's claim is beyond the purview of the petroleum tax chapter and, therefore, its appeal is not governed by the procedures set forth in § 12-597, which are properly reserved for “taxpayer[s]” I would therefore conclude that the plaintiff may avail itself of the appeal procedure set forth in § 12-33 and appeal from the defendant's disallowance of its claim as an aggrieved company. Accordingly, I would reverse the judgment of the trial court and remand the case to that court with direction to deny the motion to dismiss and for further proceedings.

I begin by reiterating the portion of the majority's conclusions with which I agree and which, in my view, support the conclusion that the plaintiff has standing as an aggrieved company under § 12-33. First, the majority, contrary to the decision of the trial court, concludes

that the 4-R act, which prohibits the state from imposing taxes that discriminate against rail carriers, applies to the petroleum tax at issue in this appeal. The majority further concludes that, under the 4-R act, the plaintiff may not file a claim for overpayment of the taxes it paid in alleged violation of the 4-R act because it only provides for injunctive or declaratory relief. Second, the majority concludes that the plaintiff is ineligible to utilize § 12-597 to appeal from the defendant's disallowance of its claim because the plaintiff is not a "taxpayer" as that word must be construed in the context of the petroleum tax chapter, and specifically with regard to § 12-597.³ In reaching this conclusion, the majority analyzes the statutory scheme and concludes that the only entities that may take an appeal under § 12-597 are distributors and refiners because, it concludes, the key statutory term taxpayer must be interpreted to mean distributors and refiners of petroleum. The plaintiff, as a consumer or purchaser of petroleum, is thus outside the scope of § 12-597 and the petroleum tax statutes.

In summary, the majority concludes that, although the plaintiff was subject to and actually bore the expense of a tax allegedly imposed in violation of federal law prohibiting discriminatory taxation of rail carriers, the plaintiff is without remedy under either the 4-R act, because the 4-R act is prospective and does not provide monetary relief, or under § 12-597, because the plaintiff is not a taxpayer within the specific meaning ascribed to that term in the petroleum tax chapter.

In my view, however, these conclusions do not negate the facts that: (1) the plaintiff bore the burden of the tax, which was specifically itemized on the bills it paid; (2) the plaintiff set forth a colorable claim that the state's former imposition of the petroleum tax on sales of petroleum fuel to rail carriers and simultaneous exemption of sales of fuel to water carriers violated the 4-R act by discriminating against rail carriers like the plaintiff; (3) when the plaintiff raised this issue with the defendant by filing a claim for overpayment of the allegedly improper taxation, the defendant disallowed the claim; and (4) the plaintiff is now attempting, as an aggrieved company, to appeal from the defendant's disallowance.

I next briefly reiterate the following relevant facts set forth by the majority and found by the trial court in its memorandum of decision. "During the period from July 1, 2003, through June 30, 2007, [the plaintiff] purchased diesel fuel in Connecticut from Sack Distributors Corporation and its predecessor, Stephen H. Sack, [doing business as] Sack Distributors, in [the city of] Hartford"⁴ The diesel fuel purchased from the distributor was used exclusively by [the plaintiff] in its locomotives as part of its interstate freight rail business. The distributor remitted the [petroleum tax], in the amount of \$100,176.91, to the [defendant]. The distribu-

tor separately billed the plaintiff for the amount of the tax that it had paid to the department of revenue services (department), and the plaintiff paid that amount directly to the distributor. . . . [T]he plaintiff [subsequently] submitted requests to the department for a refund of the money paid for the petroleum tax by the distributor to the department. *The plaintiff based its request for a refund on its claim that the petroleum tax discriminated against it because gross earnings from fuel sold for use . . . [by water carriers] are exempt from the tax, whereas gross earnings from fuel sold to rail carriers are not exempt, in violation of the 4-R act.* The [defendant] denied the plaintiff's request for a refund on the ground that only the distributor, and not the plaintiff, could request a refund because the distributor, rather than the plaintiff, had paid the tax in question.”⁵ (Emphasis added; internal quotation marks omitted.)

I begin my analysis with the text of the § 12-33. See General Statutes § 1-2z. Section 12-33 provides in relevant part: “*Any . . . 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, which shall be accompanied by a citation to said commissioner to appear before said court. . . .” (Emphasis added.)

I would conclude that § 12-33 plainly and unambiguously applies to the plaintiff in the present case. Section 12-33 contains broad and inclusive language permitting any company aggrieved by an action of the defendant to appeal from said action within one month. First, the word “[a]ny,” in conjunction with the word “company,” is one of the broadest possible formulations of standing that, in the absence of any limiting language, evinces an intent to grant standing for any properly aggrieved party. See General Statutes § 12-33; see also *Location Realty, Inc. v. Colaccino*, 287 Conn. 706, 724–25, 949 A.2d 1189 (2008) (phrases “ ‘any action’ ” and “ ‘no person’ ” were broad formulations and, in absence of any limiting language, demonstrated intent to preclude actions outside of statutory scheme); *Manifold v. Ragaglia*, 272 Conn. 410, 422, 862 A.2d 292 (2004) (concluding that text of statutory immunity provision indicated that legislature intended for word “any” to have broad application). Second, the appealing party must be a “ ‘company,’ ” which is separately defined in the tax title to mean “any person, partnership, association, company, limited liability company or corporation, except an incorporated municipality” General Statutes § 12-1. Third, § 12-33 requires that the company taking the appeal be aggrieved. Fourth, the aggrievement must result from an action of the defendant. General Statutes § 12-33.

I would next conclude that the broad statutory

requirements of § 12-33 are satisfied by the facts of the present case. The plaintiff, a specially chartered Connecticut railroad corporation, seeks judicial review of an action of the defendant, and claims that it “has been aggrieved through [the defendant’s] application of the provisions of § 12-587 to sales of fuel made to [the plaintiff] during the relevant period as well as [the defendant’s] denial of [the plaintiff’s] claims for [a] refund.” In my view, because the plaintiff’s alleged aggrievement stems from the defendant’s refusal to consider the merits of the plaintiff’s claim that the tax was imposed in violation of federal law, it is necessary to understand the reasoning behind the plaintiff’s claim in order to properly determine whether the plaintiff may appeal pursuant to § 12-33.

A review of the record demonstrates that the plaintiff’s claim was premised on its broad contention that the application of the petroleum tax itself to the plaintiff’s purchases of petroleum violated the 4-R act. In its protest of the defendant’s disallowance, the plaintiff made clear that the basis of its claim was “that [the] application of the tax to [the plaintiff’s] purchases is a violation of federal law,” and that “[t]he imposition of the [petroleum tax] to fuel purchased by [the plaintiff] for its locomotives is unlawful and violates the [4-R act]” The majority, in both parts II and III of its opinion, focuses on the fact that the plaintiff’s claim logically included monetary relief and, therefore, that the claim must be brought pursuant to the provisions of the petroleum tax chapter governing refunds. The plaintiff unquestionably sought a refund. This does not, however, alter the reason that the plaintiff filed the request or the reasoning set forth in its claim. The plaintiff’s claim was not merely that, through inadvertence, it had overpaid the tax without regard to the validity of the imposition of the tax. To the contrary, the plaintiff directly sought to challenge the unlawfulness of the petroleum tax as applied to its transactions with the distributor. In so doing, the plaintiff claimed that its pecuniary interests were aggrieved in the amount of \$100,176.91 and that it was entitled to a refund because it was unlawful for the petroleum tax to have applied in the first instance to its purchases of petroleum. The reasoning motivating the plaintiff’s claim demonstrates that § 12-33 is a valid remedy for the plaintiff as a company aggrieved by an action of the defendant.

At first, the majority grants that “the text of § 12-33 appears to permit the appeal in the present case insofar as the plaintiff is a ‘company aggrieved by the action of the [defendant]’” The majority goes on to state, however, that “this does not end [the] inquiry” because “[§] 1-2z also directs [the court] to consider the relationship of this statute to other statutes.” The majority therefore examines provisions of the petroleum tax chapter, specifically §§ 12-589 and 12-597, and their relationship to § 12-33. On the basis of its analysis,

the majority concludes that the plaintiff is barred from appealing under § 12-33 because § 12-597 is the statute specific to such appeals. I agree that, pursuant to § 1-2z, the court is obligated to look to other relevant statutes to determine whether § 12-33 is a permissible avenue of appeal for the plaintiff. I disagree, however, with the majority's analysis and would instead conclude that those provisions do not bar the plaintiff from appealing under § 12-33.

Like the majority, I first look to § 12-589 (a) (1), which provides in relevant part that “[a]ny company believing that it has overpaid any taxes imposed under section 12-587 may file a claim for refund in writing with the commissioner” That statute goes on to provide that, unless the claimant takes an appeal pursuant to § 12-597, the defendant's action on a claim for a refund becomes final after the expiration of one month. General Statutes § 12-589 (a) (4). Unlike the majority, I would conclude that this provision of the petroleum tax chapter, and its reference to § 12-597, is not binding in the present appeal. First, I would conclude that these provisions are inapplicable to the present appeal on the basis of my prior analysis of the plaintiff's claim, namely, that the plaintiff directly sought to challenge the unlawfulness of the petroleum tax as applied to its transactions with the distributor and its request for a refund was merely a logical extension.

Second, and in accordance with part II of the majority opinion, the plaintiff, as a purchaser or consumer of petroleum products, is beyond the purview of the petroleum tax chapter generally, and § 12-589 specifically, because it is not “[a]ny company,” as that phrase only includes refiners and distributors of petroleum. See General Statutes § 12-587 (b) (1) (“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”). This conclusion is supported by the legislative intent expressly set forth in the petroleum tax chapter. General Statutes § 12-599 (a) provides in relevant part that “[i]t is not the intention of the General Assembly that the tax imposed under section 12-587 be construed as a tax upon purchasers of petroleum products” In conjunction with this statement of intent, the legislature, in subsection (b) of § 12-599, enacted a provision to ensure that the petroleum tax would not become a “passthrough” tax levied onto consumers. Although a federal district court held that the anti-passthrough mechanism was unconstitutional; *Mobil Oil Corp. v. Dubno*, 492 F. Sup. 1004, 1014 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir. 1981); this court subsequently concluded in *Texaco Refining & Marketing Co. v. Commissioner of Revenue Services*, 202 Conn. 583, 596, 522 A.2d 771 (1987), that the legislative intent survived, specifically,

that the provisions of the petroleum tax continued to apply only to distributors and refiners and not to consumers or purchasers. Indeed, the majority expressly relies on this legislative intent in concluding in part II of its opinion that the plaintiff cannot appeal under § 12-597 because the legislature intended that provision to only permit appeals by taxpayers, namely, refiners and distributors of petroleum.

On the basis of the aforementioned discussion, I would conclude that § 12-597 is inapplicable to the present appeal and does not bar the plaintiff from availing itself of § 12-33. Accordingly, I disagree with the majority's application in the present appeal of the doctrine of statutory interpretation that a specific statute controls over a general statute.⁶ First, because I conclude that the language of § 12-33 is plain and unambiguous and that § 12-597 does not apply, I would adhere to this court's admonition that, "[i]f the [statute] at issue [is] in fact . . . plain and unambiguous . . . [then] resort to this canon [of statutory construction of specific over the general], which is itself a form of 'extratextual evidence of the meaning of the statute'; General Statutes § 1-2z; simply would be unnecessary." *Miller's Pond Co., LLC v. New London*, 273 Conn. 786, 811 n.25, 873 A.2d 965 (2005). Second, it is axiomatic that a specific statute should prevail over a general statute only when the specific statute actually applies to the issue presented. *Id.*, 810–11 (concluding that General Statutes § 35-44b was inapplicable to appeal and did not prevail over General Statutes § 35-31 [b]). Accordingly, and as confirmed by this legislative intent, because the plaintiff is not included in the term "taxpayer," it is not governed by the appeal provision set forth in § 12-597, and its claim is beyond the contemplation of the petroleum tax chapter. Therefore, § 12-597 cannot be the specific statute applicable to the plaintiff's appeal to the exclusion of § 12-33.

In addition to disagreeing with the application of this doctrine of statutory construction, I also disagree with the majority's resulting conclusions. First, contrary to the majority, I find it significant that § 12-33 is located within the first chapter of the tax title, which contains numerous generally applicable provisions governing the defendant.⁷ See, e.g., General Statutes § 12-2 (governing appointment, powers and duties of defendant); General Statutes § 12-2d (permitting defendant to compromise any controversy arising under applicable statutes); General Statutes § 12-30 (permitting defendant to impose penalty in cases of failure to timely file any return or report required by law). Several of these provisions specifically relate to the remaining chapters of the tax title. See, e.g., General Statutes § 12-1 (definitions); General Statutes § 12-30a (imposition of interest); General Statutes § 12-33a (court waiver of interest on certain due taxes prohibited). In my view, the location of § 12-33 within the chapter of the tax title containing generally

applicable provisions weighs in favor of permitting the plaintiff to appeal pursuant to it. I therefore disagree that § 12-33 must be discounted simply because that provision is located in another chapter of the tax title. Moreover, the location of § 12-597 in the petroleum tax chapter does not necessitate the conclusion that § 12-33 is unavailable to the plaintiff as a mechanism to appeal. In my view, § 12-597 is properly located within the chapter of the tax title devoted to the petroleum tax because that is the logical location for a provision relating to the petroleum tax that specifically governs *taxpayers* appealing therefrom. More significantly, the location of § 12-597 is immaterial in determining whether § 12-33 remains a viable remedy for the plaintiff, as I would conclude that that provision is inapplicable to the plaintiff.

Second, I would not conclude that § 12-597 displaces § 12-33 merely because § 12-597 references procedures to appeal from the petroleum tax, whereas § 12-33 does not expressly provide that it is applicable to the petroleum tax or that it is meant to supersede more specific appeals provisions. As previously set forth, although the petroleum tax now burdens consumers and purchasers, the legislature originally had intended that the tax only burden distributors and refiners. The legislature therefore drafted § 12-597 to only provide appeals for those parties as “taxpayer[s]” Accordingly, it is not significant that the petroleum tax chapter fails to reference § 12-33 because there is no reason for § 12-597, or any of the petroleum tax provisions, to reference it. In my view, it is also not significant that § 12-33 fails to reference the petroleum tax. Regardless of whether § 12-33 is termed a general appeals statute, an alternate appeals provision or an appeal provision of last resort, I see no reason why that statute would contain references to specific provisions of the tax title, as doing so would undermine its facial operation as a broad appeal provision.

Third, permitting the plaintiff to appeal pursuant to § 12-33 would not render § 12-597 superfluous. Allowing the plaintiff to appeal under § 12-33 would not permit *any* aggrieved company to appeal under that provision. This result would not occur because these companies, which qualify as taxpayers pursuant to part II of the majority opinion, would be prohibited from appealing under § 12-33 by the proper application of the aforementioned doctrine that a specific statute governs over a general statute. Moreover, the majority claims that if any company could appeal under § 12-33, and because § 12-33 already existed at the time the legislature enacted the petroleum tax chapter, “there would have been no reason for the legislature to have enacted § 12-597.” Although under the specific facts of this case the plaintiff may appeal pursuant to § 12-33, that does not dictate that the legislature had no purpose in enacting § 12-597, or that § 12-597 is a superfluous provision. As

the majority itself notes, “the legislature . . . has enacted specific appeal provisions for every kind tax in the state tax code” It is therefore perfectly logical that the legislature purposely enacted § 12-597 in order to channel through it all the appeals filed by taxpayers of the petroleum tax.⁸

Lastly, the majority concludes that § 12-597 must apply because “nothing in . . . [the] genealogy [of § 12-33] demonstrates that the legislature intended it to operate as an alternative to the specific appeal procedures otherwise provided by the legislature [in § 12-597].” I disagree that resorting to the genealogy of § 12-33 is warranted in the present appeal. First, because I would conclude that the language of § 12-33 is plain and unambiguous, I would not resort to the genealogy of that statute. *Harpaz v. Laidlaw Transit, Inc.*, 286 Conn. 102, 109, 112, 942 A.2d 396 (2008) (pursuant to § 1-2z, court resorts to legislative history and genealogy only after concluding statute is vague and ambiguous). Second, neither party has claimed that the genealogy of § 12-33 is relevant to the question of whether the plaintiff may appeal under it. The plaintiff, relying on the plain language of § 12-33, has merely characterized that provision as “a general appeal statute” and as “an alternate avenue of appeal to those . . . companies aggrieved by the actions of the [defendant] who may or may not otherwise have an avenue of appeal available to them.” I nonetheless discuss the genealogy because the majority relies on it in concluding that the plaintiff is barred from appealing under § 12-33. After reviewing the genealogy of § 12-33, I would conclude, contrary to the majority, that the genealogy of § 12-33 supports the conclusion that the plaintiff may appeal pursuant to that provision.

The majority’s analysis of the genealogy of § 12-33 reveals the following. When originally enacted in 1917, the purpose of § 12-33 was to permit parties to appeal from actions of the former board of equalization (board). Public Acts 1917, c. 186, § 1. In 1937, the legislature abolished the board, transferred its powers to the defendant and did so by striking out references to the board and replacing them with references to the defendant, including the precursor to § 12-33. General Statutes (1939 Sup.) § 317e. When the legislature merged the powers of the board with those of the defendant, it did not repeal any of the existing appeal provisions applicable to the defendant. Additionally, after the elimination of the board, the legislature amended the tax provisions formerly under the board’s control to include specific appeal provisions, and also included specific appeal provisions for all new taxes in the tax title.

From this extensive genealogy, the majority notes that “the legislature has not repealed § 12-33, and the text of that provision has largely remained unchanged,” despite the fact that during the intervening years the

legislature provided specific appeal provisions for all taxes formerly under the board, and for all new taxes. The majority concludes, however, that the genealogy of § 12-33 fails to demonstrate that the legislature intended to permit the plaintiff to appeal pursuant to § 12-33, rather than § 12-597. The majority explains, however, that § 12-33 “is not left without any purpose” because it can be “used to permit appeals from actions of the [defendant] regarding taxes or assessments for which the legislature has not provided a specific appeal statute, including those taxes or assessments codified outside the state tax code.” In reaching this conclusion, the majority relies on *Circuit-Wise, Inc. v. Commissioner of Revenue Services*, 215 Conn. 292, 293–94 and n.2, 576 A.2d 1259 (1990), wherein the plaintiff appealed a decision of the defendant pursuant to § 12-33, as the hazardous waste assessment in General Statutes § 22a-132 did not, at that time, contain an appeal provision.

I would conclude that the majority’s analysis of the genealogy of § 12-33 and its conclusion regarding the present purpose of § 12-33 actually demonstrate that the plaintiff may appeal pursuant to that statute. First, although the original purpose of § 12-33 may have been limited to appeals from the board, the legislature retained § 12-33 when it merged the board’s powers with those of the defendant. In so doing, the legislature amended § 12-33 by striking out the reference to the board and substituting in its place the defendant. This legislative action permitted any aggrieved company to appeal from an action of the defendant, without limiting the right to appeal only to a decision arising from any specific tax provision. Additionally, although the legislature has amended the taxes formerly under the board’s control to include specific appeals provisions, and despite the fact that the legislature has included specific appeals statutes for new taxes in the tax title, the legislature has retained § 12-33 without substantial alteration. Therefore, despite the passage of almost one quarter of a century since its inception, the legislature has seen fit to retain the broadly worded language of § 12-33. Second, § 12-33 has not been rendered superfluous because it serves as an avenue of appeal when the legislature fails to draft a specific appeal statute for any imposed tax.

For all of the foregoing reasons, I would conclude that the plaintiff, pursuant to § 12-33, may pursue on appeal its colorable claim that the application of the petroleum tax to its purchases of petroleum violated federal law, and that it is entitled to a refund of those impermissibly imposed taxes.

I therefore respectfully dissent.

¹ General Statutes § 12-33 provides in relevant part: “*Any . . . 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, which shall be accompanied by a citation to said commissioner to appear before said court. . . .” (Emphasis added.)

² General Statutes § 12-597 provides in relevant part: “*Any 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*” (Emphasis added.)

³ I am obliged to agree with the conclusion reached in part II of the majority opinion that the plaintiff is not a taxpayer under the petroleum tax statutory scheme, despite the fact that the plaintiff actually bore the burden of the petroleum tax. I agree with the sentiments expressed in footnote 21 of the majority opinion, and further note that it may be better tax policy to permit the entity that actually bears the economic burden to challenge the petroleum tax insofar as it may have the greatest incentive to challenge improper assessments of that tax. Indeed, because of the failure of the anti-passthrough provision in the chapter; General Statutes § 12-599 (b); the distributors of petroleum may collect the amount of the tax from purchasers at the time of sale, as was the case here. Accordingly, the distributors may possess less incentive to bring challenges to improper assessments of the tax.

⁴ I refer hereinafter to Sack Distributors Corporation and Sack collectively as the distributor throughout this dissenting opinion.

⁵ Accordingly, the defendant did not weigh the merits of the plaintiff’s claim that the petroleum tax was being improperly applied to its transactions with the distributor.

⁶ “[I]t is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. . . . The provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage.” (Internal quotation marks omitted.) *Tappin v. Homecomings Financial Network, Inc.*, 265 Conn. 741, 760, 830 A.2d 711 (2003).

⁷ The majority concludes that § 12-597 must apply instead of § 12-33 because § 12-597 is located within the chapter of the tax title containing the petroleum tax, while § 12-33 is located in a chapter setting forth “provisions relating to the [defendant] . . . generally”

⁸ There are differences in the language of §§ 12-597 and 12-33, including the instruction that an appeal filed pursuant to § 12-33 is filed in the judicial district wherein the plaintiff is located, whereas an appeal filed under § 12-597 is filed in the judicial district of New Britain, the location of the tax session of the Superior Court.
