STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MIRA OIL CO., INC.	:	DECISION
for Review of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period January 1980 through April 1982.	:	
	:	

Both the Division of Taxation and petitioner, Mira Oil Co., Inc., 53 South Main Street, Spring Valley, New York 10977, filed exceptions to the determination of the Administrative Law Judge issued on March 24, 1988 with respect to petitioner's petition for review of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period January 1980 through April 1982 (File No. 800475). Petitioner appeared by Birbrower, Montalbano, Condon, Seidenberg & Frank, P.C. (Richard H. Sarajian, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was held at the request of the parties on January 31, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether, as the result of a field audit, the Division of Taxation properly determined the amount of motor fuel tax due.

II. Whether penalties should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioner, Mira Oil Co., Inc. ("Mira Oil"), is a New York corporation which is in the business of distributing motor fuel. It was petitioner's practice to purchase motor fuel from various suppliers in New Jersey and to deliver the product to retail service stations in New Jersey, portions of lower New York State and Connecticut. On December 27, 1982, the Division issued a Notice of Determination of Tax Due under Motor Fuel Tax Law against petitioner, stating that it had been determined on the basis of a fieldaudit that additional tax was due in the amount of $317,073.44, plus penalty of $46,609.80, for a total amount due of $363,683.24.

In the course of the audit, the Division requested an opportunity to examine the purchases journal, disbursements journal and invoices for the purchase of motor fuel. Thereafter, petitioner provided a purchases journal for the period August 1980 through June 1981. The purchase invoices were in boxes in order of suppliers. However, they were not complete and there was no summary of the invoices. The Division attempted to perform a test period audit which proved unavailing because of the numerous discrepancies between the purchase invoices and the purchases journal. Further, a test period audit could not be performed due to petitioner's practice of purchasing gasoline in a random fashion from the least expensive supplier. The Division was therefore unable to obtain the required purchase information from a specific supplier. Eventually, the Division compiled the purchase orders from each supplier, placed them in chronological order and summarized them. The Division then attempted to ascertain whether the gasoline was delivered in New York, New Jersey or Connecticut.

The Division examined the MT-123's[1] with respect to petitioner, compared them with petitioner's invoices and found many discrepancies. In an attempt to resolve these discrepancies, the Division visited the offices of some of petitioner's suppliers and summarized the suppliers' records to determine whether fuel was sold in New York, New Jersey or an undisclosed location. Thereafter, the Division considered gasoline delivered in New York or to an undisclosed location to be taxable. The Division identified motor fuel purchased from eleven suppliers as subject to tax.[2] The Division concluded, on the basis of an audit of the suppliers' records, that tax was due when petitioner's receipts of motor fuel which did not include payment of New York motor fuel tax ("tax-free receipts") exceeded those receipts of fuel reported on petitioner's motor fuel tax returns.

The Division found that petitioner did not report any motor fuel imported into New York from Lebel Oil Corp., A. Tarricone, Inc. or G. E. Warren. Most of the fuel purchased from A. Tarricone, Inc. was delivered in New Jersey. Nevertheless, petitioner did not report those purchases of fuel from A. Tarricone, Inc. which were delivered in New York.

Petitioner's records disclosed that on many occasions its purchases of motor fuel from Lebel Oil Corp. for January 1980 through September 1980 included payment of New York tax. However, Lebel Oil Corp. was not registered as a distributor under Article 12-A of the Tax Law during this period of time. Consequently, the Division treated all of petitioner's receipts of fuel from Lebel Oil Corp. as subject to tax.

In August 1984 and November 1986, petitioner submitted additional documentation which revealed that additional gallons of motor fuel were delivered to locations other than New York or

---

[1]The Division prepares a form known as an MT-123. This form lists the receipts of motor fuel by a distributor as reported on the returns of a supplier.

[2]These suppliers were Ashland Oil Co., Atlantic-Richfield, Bulk Sales Corp. of New Jersey, Coastal State Marketing, General Oil Distributors, Inc., Gulf Oil Corporation, Kimber-Allen Petroleum Corporation, Lebel Oil Corporation, Marin Motor Oil, Inc., A. Tarricone, Inc. and G. E. Warren.

that the applicable tax had been paid. As a result, the Division agreed to reduce the gallons subject to tax by 453,975 gallons and 196,896 gallons, respectively.

After the assessments were issued, petitioner requested that Kimber-Allen Petroleum Corporation ("Kimber-Allen") provide it with a listing of petitioner's purchases for the period January 1, 1981 through April 30, 1982. According to Kimber-Allen's response, it sold 7,469,286 gallons of fuel to petitioner during the period July 1981 through January 1982. Petitioner then compared this record with its available sales invoices and bills of lading to ascertain where the fuel was delivered. As a result, petitioner was able to account for the delivery of 7,178,599 gallons of fuel, which represented approximately 96 percent of the fuel which Kimber-Allen purportedly sold to petitioner for the period July 1981 through January 1982.

Petitioner's analysis revealed that of the 7,178,599 gallons accounted for, as described above, 195,351 gallons were delivered to Connecticut and 1,761,773[3] gallons were delivered to New Jersey. The discrepancy arose because it was Kimber-Allen's practice to report all gallons as delivered to New York when a load of gasoline was split between New York and New Jersey and a majority of the load was delivered to New York. Petitioner's review also disclosed that it was Kimber-Allen's practice to report all gallons which were actually delivered to Connecticut as gallons delivered to New York. Petitioner's accountant was unable to account for the disposition of 290,687 gallons of fuel purchased from Kimber-Allen during the period July 1981 through January 1982.

The asserted deficiency of motor fuel tax for the period July 1981 through January 1982 with respect to purchases from Kimber-Allen was premised upon the failure to report 1,030,868 gallons subject to tax. During the same period, it is undisputed that petitioner paid tax to New York on 4,656,450 gallons received from this supplier.

On its motor fuel tax return for February 1982, petitioner inadvertently included 12,542 gallons of gasoline which were delivered to New Jersey.

---

[3]It appears that there was an arithmetic error in petitioner's brief. Consequently, a different figure is used here.

Petitioner reported on its return for October 1981 that it purchased 152,291 gallons of motor fuel subject to tax from Coastal States Marketing ("Coastal"). However, Coastal's records disclose that petitioner purchased 31,438 gallons of motor fuel subject to tax for the same period. The discrepancy was due to petitioner's having erroneously reported as purchases subject to tax from Coastal the purchase of 121,147 gallons from Kimber-Allen for which no tax was due.

Petitioner's accountant reviewed Arco's invoices for the month of November 1981 and found instances where petitioner was assessed tax on gallons of fuel which were not delivered in New York and other instances where no tax was assessed on gallons of fuel which were delivered in New York. The net result was that the Division assessed tax on 34,000 gallons of fuel which were not delivered in New York.

OPINION

In the determination below the Administrative Law Judge decided that petitioner's records were inadequate so that the utilization of records from third parties to ascertain petitioner's tax liability was permissible. With respect to the results of the audit as performed, the Administrative Law Judge found that certain portions of the audit should be sustained while other portions should be modified.

On exception petitioner contends that (1) it is entitled to an adjustment of 43,053 gallons for fuel delivered during May of 1982, (2) it is entitled to an adjustment of 17,002 gallons inaccurately included by the auditor, and (3) facts have been presented which are sufficient to justify the abatement of penalty in full or in part.

On exception the Division argues that (1) petitioner did not present clear and convincing evidence to support a revision of the points of delivery of gasoline from Kimber-Allen, (2) it was not reasonable for the Administrative Law Judge to conclude that unaccounted for gallons of gasoline purchased from Kimber-Allen were delivered to various locations in the same proportion as the delivery locations claimed by petitioner for Kimber-Allen purchases during a different period, and (3) since the adjustment of 34,000 gallons purchased from Arco is not supported by

any evidence other than the undocumented conclusion of petitioner's accountant, no revision should be made.

We modify the determination of the Administrative Law Judge.

Since petitioner is a corporation which imports, or causes to be imported, motor fuel for use, distribution, storage or sale within New York, it is a "distributor" for purposes of the motor fuel tax (Tax Law § 282.1). According to the motor fuel tax, distributors are required to "keep a complete and accurate record of all purchases and sales or other dispositions [of motor fuel]" (Tax Law § 286.1; Matter of Petroleum Sales and Service v. Bouchard, 98 AD2d 882, 470 NYS2d 865, affd 64 NY2d 671, 485 NYS2d 252). Since it is clear that petitioner's records were not complete and accurate as required by Tax Law § 286.1, it was permissible for the Division to utilize records of third parties in order to ascertain petitioner's tax liability. When such an estimation procedure is properly resorted to, the burden of proof is on the petitioner to establish that the Division erred in its determination of additional tax due.

The first issue which we will address is petitioner's claim that it is entitled to an adjustment for 43,053 gallons of fuel delivered during May of 1982. As this adjustment was conceded by the Division at oral argument before this Tribunal (Tr. p. 3), we agree that the audit should be adjusted by this amount.

The second issue which we will address is petitioner's claim that it is entitled to an adjustment of 17,002 gallons. Petitioner argues that the auditor counted invoices in the amount of 8,500 and 8,502 gallons twice so that the audit was overstated by 17,002 gallons. Petitioner contends that only single deliveries of 8,500 gallons and 8,502 gallons occurred on July 2, 1980 to the Spring Valley and New City stations. We disagree. Both the testimony of the auditor and the audit work papers support the inclusion of the full 17,002 gallons at issue. The auditor specifically testified that he recorded the figures at issue as a result of separate invoices he reviewed which stated the gallons delivered (Tr. 11/29/86, pp. 85-86). Further, the audit work papers contain separate invoice claim numbers from Bulk Sales Corporation of New Jersey which indicate that a total of 17,000 gallons was delivered to the Spring Valley, New York station on

July 2, 1980 and a total of 17,004 gallons was delivered to the New City, New York station on July 2, 1980 (Division's Exhibit I, Schedule C, p. 31). Petitioner's mere assertion that a double counting occurred fails when confronted by the explanation of the auditor and the separate invoice numbers indicating delivery of the full amount at issue. Thus, we conclude that the 17,002 gallons disputed by petitioner were properly included by the auditor.

The next issue which we will address is petitioner's claim that a portion of the penalties imposed should be abated as a result of petitioner's belief that tax which it was paying on certain purchases was being remitted to the State of New York. Tax Law § 289-b(1)(a) provides for the imposition of penalty upon persons who fail to timely file a return or timely pay any tax under Article 12-A. Prior to June 1, 1985 and during the period at issue, Tax Law § 289-b(1) also provided for the remission of all or part of such penalty if the (former) State Tax Commission found the failure to be "excusable". After June 1, 1985, Tax Law § 289-b(1)(c) (as amended by L 1985, ch 44) provided for the remission of penalty if the failure was due to reasonable cause and not due to willful neglect. 20 NYCRR 416.3[4] defines reasonable cause for purposes of Tax Law § 289-b(1)(c). Among the grounds for reasonable cause set forth in the regulations, one is particularly relevant:

> "(4) A pending petition to the Commissioner of Taxation and Finance for an advisory opinion or declaratory ruling, a pending conciliation conference proceeding in the Bureau of Conciliation and Mediation Services of the Division of Taxation, a pending petition to the Division of Tax Appeals or a pending action or proceeding for judicial determination may constitute reasonable cause, until the time in which the taxpayer has exhausted its administrative or judicial remedies, as applicable, for a taxable period or periods the return or returns for which are due subsequent to the filing of the petitioner with the Commissioner of Taxation and Finance, the commencement of the conciliation conference proceeding, the filing of the petition with the Division of Tax Appeals or the commencement of the judicial action or proceeding, provided that:
>
> (i) the petition, action or proceeding involves a question or issue affecting whether or not the individual or entity is subject to tax and/or required to file a return;

[4]Although the effective date of this regulation, April 4, 1988, was subsequent to the period at issue, it nonetheless provides guidance herein. Further, it is noted that no regulations were promulgated to define an "excusable failure" for purposes of former Tax Law § 289-b(1)(a).

> (ii) the petition, action or proceeding is not based on a position which is frivolous nor is intended to delay or impede the administration of article 12-A of the Tax Law; and
>
> (iii) the facts and circumstances for such taxable period or periods are identical or virtually identical to those of the taxable period or periods covered by the petition, action or proceeding" (20 NYCRR 416.3[c][4]).

The record indicates that for the period January 1980 through September 1980 petitioner paid tax on 356,607 gallons of fuel purchased from Lebel Oil and petitioner mistakenly believed the tax was being remitted to New York State. This same misunderstanding was involved in a prior matter involving petitioner with respect to certain of its purchases for the period November 1977 through February 1978 (see, Mira Oil Co. v. Chu, 114 Ad2d 619, 494 NYS2d 458 appeal dismissed 67 NY2d 756, 500 NYS2d 1027 lv denied 68 NY2d 602, 505 NYS2d 1026). In this previous matter, the former State Tax Commission cancelled the penalties (Matter of Mira Oil Co., State Tax Commn., December 20, 1983). Accordingly, pursuant to (former) Tax Law § 289-b, we cancel the penalties on the purchase of 356,607 gallons from Lebel Oil as the failure to pay New York motor fuel tax on such purchases was "excusable" as petitioner reasonably assumed, although incorrectly, that the tax it paid on such purchases was New York tax and not New Jersey tax. Further, we find the abatement of penalty to be supported by 20 NYCRR 416.3(c)(4) as: (1) administrative proceedings were pending on petitioner's prior petition when the Lebel purchases were made, (2) the proceedings involved a question of whether petitioner was subject to tax or required to file a return, (3) the proceeding was not frivolous and was not intended to delay the administration of Article 12-A of the Tax Law, and (4) the facts and circumstances of the present case are virtually the same as those of the prior proceeding with respect to the erroneous assumption that New York tax was being paid on certain purchases.

Petitioner's claim that penalty should be abated on purchases from Arco, A. Tarricone Inc. and G.E. Warren is rejected as the record does not indicate that petitioner made erroneous tax payments on these purchases.

We now turn to the exception of the Division of Taxation. The Division's first argument is that the Administrative Law Judge erred in concluding that petitioner presented evidence which

justified a revision of the points of delivery of gasoline from Kimber-Allen. The Division asserts that the explanation offered by petitioner's accountant concerning the points of delivery of the fuel at issue and Kimber-Allen's billing practices was not sufficient to meet petitioner's burden of proving that the audit was erroneous and that the resulting deficiency was excessive. We disagree. The facts indicate that petitioner's accountant made a comparison of petitioner's sales invoices and bills of lading with the records of Kimber-Allen which show purchases from Kimber-Allen by petitioner. As a result of this comparison, petitioner's accountant concluded that 195,351 gallons were delivered to Connecticut and 1,761,773 gallons were delivered to New Jersey. At the hearing, petitioner's accountant explained that these gallons were originally reported as delivered to New York due to Kimber-Allen's practice of reporting all gallons as delivered to New York when a load was split between New Jersey and New York and the majority of the load was delivered to New York. Further, the accountant testified that it was also Kimber-Allen's practice to report all gallons which were actually delivered to Connecticut as delivered to New York.

The determination by the Administrative Law Judge that the explanation offered by petitioner's accountant was credible is significant. By providing testimony which was found to be both credible and accurate concerning the explanation of discrepancies in the records, petitioner has met its burden of proving that the audit was erroneous in this respect. The Division has merely objected to the Administrative Law Judge's acceptance of this testimony as being sufficient without providing any specific reason or evidence why we should find it not to be credible. We conclude that the explanation offered was in fact sufficient to explain errors in the records and that the deficiency was properly modified.

The next issue which we will address is the Division's claim that it was not reasonable for the Administrative Law Judge to conclude that unaccounted for gallons of gasoline purchased from Kimber-Allen were delivered to various locations in the same proportion as the delivery locations claimed by petitioner for Kimber-Allen purchases during a different period. As in the preceding discussion, it was the testimony of petitioner's accountant which provided the basis for

the adjustment at issue. We, however, cannot sustain the modification in this instance. Even accepting the testimony of petitioner's accountant that in his opinion "the way the remaining invoices would be allocated between states would be to take the total of what was missing and estimate with a pattern that developed over the invoices that had been discovered" (Tr. 11/25/86, p. 37) the record is lacking any evidence which would provide a basis for finding the audit as performed in this instance to be unreasonable. The statement offered by petitioner's accountant here is only his opinion on audit technique. No evidence, testimonial or otherwise, has been offered by petitioner to explain the delivery locations of the missing invoices. In contrast, petitioner's accountant previously provided a sufficient explanation as to the discrepancy in delivery locations due to Kimber-Allen's billing practices. Here nothing more than the accountant's opinion of audit style has been offered. While it is true that an audit in the manner suggested by petitioner's accountant may be reasonable, this does not mean that the audit performed here was unreasonable. The burden upon petitioner is to show that the audit was erroneous. Petitioner's suggestion here that another method of audit might more accurately determine its liability falls far short of its burden of proving the Division's methodology erroneous. In the absence of any evidence indicating that the unaccounted for gallons of gasoline purchased from Kimber-Allen were delivered outside of New York, we conclude that it was reasonable for the Division to assume that all of such gallons were delivered in New York. Accordingly, we modify the determination of the Administrative Law Judge in this respect.

The last issue which we will address is the Division's claim that the adjustment of 34,000 gallons for fuel purchased from Arco is not supported by any evidence other than the undocumented conclusion of petitioner's accountant. The Division's argument here is very similar to its first argument that petitioner did not support its claim for a revision of points of delivery. We disagree. The facts indicate that petitioner's accountant reviewed Arco's invoices for the month of November 1981 and found instances where petitioner was assessed tax on fuel not delivered in New York and other instances where no tax was assessed on fuel which was delivered in New York. The net result of this review was an assessment by the Division on

34,000 gallons of fuel not delivered in New York. The determination by the Administrative Law Judge that petitioner's accountant's testimony was both credible and accurate with regard to the records of Arco which were examined supports the modification that was made. As a result, we sustain the modification as made by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Mira Oil Co., Inc. is granted to the extent that an adjustment for 45,053 gallons of fuel delivered in May 1982 is allowed, based on the Division of Taxation's concession, and to the extent that penalty imposed based on the purchase of 356,607 gallons of motor fuel from Lebel Oil is cancelled, but is in all other respects denied;

2. The exception of the Division of Taxation is granted to the extent that the adjustment made by the Administrative Law Judge in conclusion of law "E" for 79,251 gallons of fuel purchased from Kimber-Allen is disallowed but is in all other respects denied;

3. The determination of the Administrative Law Judge is modified to the extent indicated in paragraphs "1" and "2" above and is in all other respects sustained;

4. The petition of Mira Oil Co., Inc. is granted to the extent indicated in paragraph "1" above and in conclusions of law "C", "D", "E", "F" and "I" of the determination of the Administrative Law Judge except to the extent the determination is modified as indicated "2" above; and

5. The Division of Taxation is directed to modify the Notice of Determination dated December 27, 1982 in accordance with paragraph "4" above but such Notice is otherwise sustained.

DATED: Troy, New York
July 19, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner