

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HARBOR PETROLEUM CORP. :
for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the Tax :
Law for the Period July 1984. :

In the Matter of the Petition :
of :
HARBOR PETROLEUM CORP. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period July 1984. :

DECISION

In the Matter of the Petition :
of :
LAWRENCE E. SMITH :
OFFICER OF HARBOR PETROLEUM CORP. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period July 1984. :

Petitioner Harbor Petroleum Corp., 15 Lexington Avenue, New Haven, Connecticut 06513, filed an exception to the determination of the Administrative Law Judge issued on June 9, 1988 with respect to its petitions for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period July 1984 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period July 1984 (File Nos. 801569 and 801747).

Petitioner Lawrence E. Smith, officer of Harbor Petroleum Corp., 15 Lexington Avenue, New Haven, Connecticut 06513, filed an exception to the determination of the Administrative

Law Judge issued on June 9, 1988 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period July 1984 (File No. 801746). Petitioners appeared by Levine & Robinson, P.C. (Kenneth L. Robinson, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Both petitioners and the Division filed briefs on exception. Oral argument was heard at the petitioner's request on March 21, 1989.

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

ISSUE

Whether Harbor Petroleum Corp. is liable for motor fuel tax and sales tax with respect to two bargeloads of gasoline shipped from New Jersey into New York.

FINDINGS OF FACT

We find the facts as stated by the Administrative Law Judge and such facts are stated below. We also find certain additional facts as indicated below.

Petitioner Harbor Petroleum Corp. ("Harbor") is a Delaware corporation authorized to do business in the State of Connecticut, with offices at 15 Lexington Avenue, New Haven, Connecticut. Since 1978, Harbor has been primarily engaged in the waste oil business in Connecticut. In April 1983, Harbor was granted a Connecticut motor fuel distributor's license and since that time has also participated in Connecticut motor fuel transactions. Harbor has never held a New York distributor's license; however, it registered with New York as a sales tax vendor on October 21, 1981. On the registration form, Harbor indicated that it did not expect to collect sales and use taxes or to pay over such taxes to the Department of Taxation and Finance.

In or about June 1984, one of Harbor's customers, Fireline Petroleum Supply Distribution Company, Inc. ("Fireline") of Canton, Massachusetts, telephoned petitioner Lawrence E. Smith, president of Harbor, and informed him that Fireline needed gasoline for the upcoming

Independence Day weekend. Fireline is affiliated with the Cumberland Farms chain of convenience stores and gas stations and is a registered New York State motor fuel distributor. Harbor made inquiries with fuel brokers in the New York and New Jersey area in order to locate a supply of gasoline. Mr. Smith was then contacted by David Bogatin, president of Lesez Petroleum Corp. ("Lesez") of Oceanside, New York, who offered to sell gasoline. Mr. Smith met with Mr. Bogatin at Lesez's terminal in Oceanside. Mr. Smith observed that the terminal had substantial storage capacity and apparently could deliver motor fuel by barge or tank truck. The terminal appeared to be quite busy. Mr. Smith advised Mr. Bogatin that Harbor was not a licensed New York distributor and consequently would be required to pay all motor fuel and sales taxes to Lesez. Mr. Bogatin agreed that the selling price would include all taxes.

THE FIRST SHIPMENT

Harbor entered into contracts to purchase the gasoline from Lesez and to sell it to Fireline. The terms of the contracts were set forth in telex messages, some of which are in the record.

(a) Contract between Harbor and Lesez.

(1) A telex from Lesez to Harbor dated June 26, 1984 at 15:16 Eastern Standard

Time provided as follows:

"CONFIRMING OUR TELEPHONE CONVERSATION ON 6/26/84
CONCERNING PURCHASE OF 50,000 BARRELS OF PETROLEUM
PRODUCTS.

25,000 BARRELS OF REGULAR AT .89 - 934,500.00
25,000 BARRELS OF NO-LEAD AT .93 - 976,500.00
TOTAL -1,911,000.00

PAYMENT FOR THE SAID BARRELS TO BE AS FOLLOWS

HARBOR PETROLEUM SHALL PROVIDE AN IRREVOCABLE LETTER OF
CREDIT MADE OUT TO LESEZ PETROLEUM CORP.

3631 HAMPTON ROAD
OCEANSIDE, NY

TO CITIBANK
2243 JACKSON AVENUE
LONG ISLAND CITY, NY 11101
ATTENTION [sic]: ED ODOGART
ACCOUT [sic] # 154-56070

ALSO HARBOR PETROLEUM WILL PAY UPON LOADING OF BARGE A CERTIFIED CHECK FOR THE SUM OF \$1,911,000.00 PAYABLE TO LESEZ PETROLEUM CORP. - CHECK TO BE GIVEN TO A REPRESENTATIVE OF LESEZ PETROLEUM CORP.

LESEZ PETROLEUM CORP WILL BE A COMMISSIONED BROKER IN THIS TRANSACTION YOU WILL RECEIVE YOUR INVOICES FROM THE SUPPLYING CO. DEBBI OIL CORP. STATING ALL APPLICABLE TAXES ARE PAID."

(2) The telex message which accepted this offer is not in the record. Notations on a copy of the offering telex, however, indicate that it was accepted with the change that the funds would be paid by wire, rather than by certified check.

(b) Contract between Harbor and Fireline.

(1) A telex from Harbor to Cumberland Farms dated June 26, 1984 at 12:21 Eastern Standard Time provided as follows:

"CONFIRMING ARRANGEMENTS BETWEEN CUMBERLAND FARMS (JACK RYAN) AND HARBOR PETROLEUM CORPORATION (LARRY SMITH). CUMBERLAND FARMS AGREES TO PURCHASE AND HARBOR PETROLEUM AGREES TO SELL THE HEREIN SPECIFIED COMMODITY UNDER THE TERMS AND CONDITIONS SET FORTH AS FOLLOWS:

COMMODITY: REGULAR LEADED GASOLINE AND UNLEADED REGULAR GASOLINE.

QUANTITY: MAXIMUM 25,000 BARRELS OF REGULAR LEADED GASOLINE.

MAXIMUM 25,000 BARRELS OF UNLEADED REGULAR GASOLINE.

MEASUREMENTS: SELLERS BARGE LOADED QUANTITY AT LOADING DOCK. QUALITY: GOOD COMMERCIAL GRADE - TO MEET ASTM AND NEW YORK HARBOR SPECIFICATIONS.

DESTINATION: DELIVERED AGWAY TERMINAL ALBANY, NEW YORK.

PRICE: \$.94 PER GALLON REGULAR GASOLINE PRICE INCLUDES ALL APPLICABLE NEW YORK STATE AND FEDERAL TAXES.
\$.99 PER GALLON UNLEADED REGULAR GASOLINE PRICE INCLUDES ALL APPLICABLE NEW YORK STATE AND FEDERAL TAXES.

TERMS: AN IRREVOCABLE LETTER OF CREDIT PAYABLE TO HARBOR PETROLEUM CORPORATION, 15 LEXINGTON AVENUE, NEW HAVEN, CONNECTICUT 06513 STATING FUNDS TO BE WIRED TO H.P.C. BANK ACCOUNT AT CITY TRUST, 961 MAIN STREET,

BRIDGEPORT, CONN., ACCOUNT NUMBER #840-5158,
ATTENTION WILLIAM BARNHARDT UPON LOADED QUANTITY
BEING MEASURED BY INDEPENDANT [sic] INSPECTORS
(E.W. SAYBOLT & COMPANY) PRIOR TO VESSEL LEAVING
SELLERS DOCK."

(2) A telex from Fireline to Harbor dated June 26, 1984 at 16:00 Eastern Standard

Time provided as follows:

"RE: SALES AGREEMENT TELEX THIS DATE

WE ARE IN AGREEMENT WITH THE CONTENTS OF THE REFERENCED
SALES CONTRACT WITH THE FOLLOWING CHANGES:

- 1) THE PURCHASER SHOULD BE REGARDED AS FIRELINE
PETROLEUM SUPPLY
////////////////////////////////////
DISTRIBUTION CO. INC., 777 DEDHAM STREET, CANTON MA. 0202
[sic]
////////////////////////////////////
RATHER THAN CUMBERLAND FARMS.
- 2) DESTINATION: DELIVERED TO AGWAY TERMINAL ALBANY, NEW
YORK
O/A JUNE 29, 1984.
////////////////////////////////////
- 3) PRICE TO INCLUDE ALL APPLICABLE NEW YORK STATE,
FEDERAL, AND
ALBANY COUNTY SALES TAXES.
////////////////////////////////////
- 4) QUANTITIES: 25KBBLS EACH OF REGULAR LEADED AND
REGULAR UNLEADED GASOLINE PLUS OR MINUS 10-0/0.
- 5) TERMS: TO ADD: PRODUCT LOADED ONTO REINAUER BARGE TO
BE CONSIGNED TO FIRELINE PETROLEUM SUPPLY DISTRIBUTION
COMPANY INC.

J. J. RYAN
DIRECTOR SUPPLY/DISTRIBUTION"

Approximately 24 hours before the gasoline was to be loaded for shipment, Lesez informed Harbor that it could not make timely delivery as per the agreement of June 26th and also reneged on its agreement to pay for delivery. Harbor, under pressure from Fireline, agreed to pay for the barging of the fuel to Albany if Lesez would expedite the shipment. On July 7, 1984, Reinauer Transportation Company ("Reinauer") barge B-85 left Northville at Linden, New Jersey for the GATX terminal at Carteret, New Jersey. It left Carteret for Albany on July 8th

and arrived at the Agway terminal in Albany on July 9th. Delivery was completed on July 10th. The cargo was verified as 49,818 barrels (2,086,253 gallons) of gasoline. Harbor was billed \$22,418.11 by Reinauer for barge transportation. Harbor paid said bill.

Harbor paid Lesez for the gasoline by an irrevocable commercial letter of credit in the amount of \$1,911,000.00, drawn on its bank, Citytrust, dated July 5, 1984 and expiring July 9, 1984. The beneficiary of the letter was Lesez Petroleum. The letter required that the following documents be produced before payment would be made:

- "1. A barge loading receipt from E.W. Saybolt and Co. evidencing shipment to Harbor Petroleum Corp.
2. A signed inspection certificate from E.W. Saybolt and Co. stating product meets A.S.T.M. standard spec. for regular leaded gasoline and regular unleaded gasoline and quantity.
3. A statement purportedly signed by an officer of the beneficiary stating the accountee has been shipped approximately 25,000 barrels regular leaded gasoline and approximately 25,000 barrels regular unleaded gasoline and payment has not been received.
4. Signed commercial invoices in duplicate stating that it [sic] covers:
Approximately 25,000 barrels regular leaded gasoline and approximately 25,000 barrels regular unleaded gasoline; all applicable New York State, County, and Federal taxes are included in the price."

Special conditions of the letter were stated as follows:

"SPECIAL CONDITIONS: It is a condition of this letter of credit that it will expire prior to the stated expiration date when the account party transfers by wire approximately \$1,911,000.00 to Lesez Petroleum Corp. which we understand will occur when the account party receives acknowledgement from E.W. Saybolt and Co. that the product has been loaded. Citytrust agrees with you that all drafts drawn under and in compliance with the terms of this credit will be duly honored if presented at our counters before the expiration date."

Fireline paid Harbor also by letter of credit. Payment was made when the quantity was verified upon loading in New Jersey by E. W. Saybolt & Co., Inc. ("Saybolt"), inspectors. Harbor and Fireline shared the costs of the Saybolt inspection. The payments from Fireline to Harbor and from Harbor to Lesez were virtually contemporaneous. Harbor received an invoice of Lesez (rather than Debbie Oil Corp., as stated in the telex) dated July 10, 1984 for the following:

<u>Gallons</u>	<u>Type</u>	<u>Cost Per Gallon</u>	<u>Total</u>
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1,039,803	Regular	\$.89	\$ 925,424.67
1,047,564	No Lead	\$.93	<u>974,284.52</u>
		Total	\$1,899,659.19

The invoice stated that the amount included "Federal excise tax, State excise tax, Sales tax, County tax, Gr. Rec. tax & all applicable taxes".

Further, we find the following additional fact:

Harbor's letter of credit issued to Lesez used Fireline's letter of credit as collateral.

The Telex Messages of July 3, 1984

There are three other telex messages dated July 3, 1984 in the record.

(a) A telex from Lesez to Harbor dated July 3, 1984 at 14:49 Eastern Standard Time stated as follows:

"CONFIRMING OUR TELEPHONE CONVERSATION ON 7/3/84
CONCERNING PURCHASE OF 50,000 BARRELS OF PETROLEUM
PRODUCTS.

25,000 BARRELS OF REGULAR AT .89 - 934,500.00
25,000 BARRELS OF NO-LEAD AT .93 - 976,500.00
TOTAL - \$1,911,000.00

PAYMENT FOR THE SAID BARRELS TO BE AS FOLLOWS:

HARBOR PETROLEUM SHALL PROVIDE AN IRREVOCABLE LETTER OF
CREDIT MADE OUT TO LESEZ PETROLEUM CORP.

3631 HASMPTON [sic] ROAD
OCEANSIDE, NY 11572

TO CITIBANK
2243 JACKSON AVENUE
LONG ISLAND CITY, NY 11101
ATTENTION: ED ODOGART
ACCOUNT # 154-56078

ALSO HARBOR PETROLEUM WILL PAY UPON LOADING OF BARGE WIRE
TRANSFER OF FUNDS FOR THE SUM OF \$1,911,000.00 PAYABLE TO
LESEZ PETROLEUM CORP. ON BEHALF OF DEBBIE OIL CORP. TO ABOVE
BANK.

LESEZ PETROLEUM CORP. WILL BE A COMMISSIONED BROKER IN THIS
TRANSACTION YOU WILL RECEIVE YOUR INVOICES FROM THE
SUPPLYING COMPANY DEBBIE OIL CORP. STATING ALL APPLICABLE
TAXES ARE PAID."

(b) A telex from Harbor to Fireline dated July 3, 1984 at 15:15 Eastern Standard Time provided as follows:

"CONFIRMING ARRANGEMENTS BETWEEN FIRELINE PETROLEUM (JACK RYAN) AND HARBOR PETROLEUM CORPORATION (LARRY SMITH). FIRELINE PETROLEUM AGREES TO PURCHASE AND HARBOR PETROLEUM AGREES TO SELL THE HEREIN SPECIFIED COMMODITY UNDER THE TERMS AND CONDITIONS SET FORTH AS FOLLOWS:

COMMODITY: REGULAR LEADED GASOLINE AND UNLEADED REGULAR GASOLINE.

QUANTITY: MAXIMUM 25,000 BARRELS OF REGULAR LEADED GASOLINE PLUS
OR MINUS 10-0/0.

MAXIMUM 25,000 BARRELS OF UNLEADED REGULAR GASOLINE PLUS
OR MINUS 10-0/0.

MEASUREMENTS: SELLERS BARGE LOADED QUANTITY AT LOADING DOCK.

QUALITY: GOOD COMMERCIAL GRADE - TO MEET ASTM AND NEW YORK HARBOR SPECIFICATIONS. DESTINATION: DELIVERED AGWAY TERMINAL ALBANY, NEW YORK O/A JULY 7, 1984.

PRICE: \$.94 PER GALLON REGULAR GASOLINE PRICE INCLUDES ALL APPLICABLE NEW YORK STATE, FEDERAL AND COUNTY SALES TAX.
\$.99 PER GALLON UNLEADED REGULAR GASOLINE PRICE INCLUDES ALL NEW YORK STATE, FEDERAL AND COUNTY SALES TAX.

TERMS: AN IRREVOCABLE LETTER OF CREDIT PAYABLE TO HARBOR PETROLEUM CORPORATION, 15 LEXINGTON AVENUE, NEW HAVEN, CONNECTICUT 06513 STATING FUNDS TO BE WIRED TO H.P.C. BANK ACCOUNT AT CITY TRUST, 961 MAIN STREET, BRIDGEPORT, CONN., ACCOUNT NUMBER #840-5158, ATTENTION WILLIAM BARNHARDT UPON LOADED QUANTITY BEING MEASURED BY INDEPENDANT [sic] INSPECTORS (E.W. SAYBOLT & COMPANY) PRIOR TO VESSEL LEAVING SELLERS DOCK. -- INSPECTION COSTS TO BE SHARED BETWEEN BUYER AND SELLER.

IT IS FURTHER UNDERSTOOD AND AGREED THAT ALL ORDERS ARE ACCEPTED SUBJECT TO AVAILABILITY OF PRODUCT TO SELLER AT THE TIME OF DELIVERY AND WILL NOT BE LIABLE FOR ANY DELAY IN PERFORMANCE OR IN DELIVERY OF PRODUCT OR ANY DAMAGE SUFFERED BY BUYER BY REASON OF SUCH DELAY WHEN SUCH DELAY

IS DIRECTLY OR INDIRECTLY CAUSED BY THE UNAVAILABILITY OF PRODUCT OR ANY OTHER CAUSE OR CAUSES BEYOND ITS CONTROL. PLEASE ADVISE."

(c) A telex from Fireline to Harbor dated July 3, 1984 at 16:37 Eastern Standard Time provided as follows:

"FIRELINE PETROLEUM SUPPLY DISTRIBUTION [sic] COMPANY INC. CONCURS WITH THE CONTENTS OF SUBJECT SALES AGREEMENT EXCEPT FOR THE FOLLOWING:

TERMS TO INCLUDE: PRODUCT LOADED ONTO BARGE TO BE BONSHIGNED [sic]

//////////

TO FIRELINE PETROLEUM SUPPLY DISTRIBUTION [sic] COMPANY, INC."

It is not clear from the record whether the above telex messages pertain to a second shipment of gasoline as stated in an affidavit of Mr. Smith which is in the record, or constituted a novation or modification of the first contract. Mr. Smith testified that before Harbor made the first shipment, Fireline asked to enlarge the first contract to double its size. It is noted, however, that the selling prices in these telex messages appear to be consistent with the first shipment not the second. Also the delivery date, July 7, is two days prior to the delivery of the first shipment in Albany.

THE SECOND SHIPMENT

Shortly after delivery of the above shipment, Harbor entered into a similar arrangement for a second bargeload of gasoline with Fireline and Lesez. Assuming that the telex messages referred to earlier do not apply to the second shipment,¹ the only document in the record setting forth the terms of this transaction with Fireline is a telex from Harbor to Fireline dated July 13, 1984 which states that Harbor offered the following:

"CONFIRMING ARRANGEMENTS BETWEEN FIRELINE PETROLEUM (JACK RYAN) AND HARBOR PETROLEUM CORPORATION (LARRY

¹As noted earlier, there is conflicting evidence as to which of the two shipments the telex messages of July 3rd pertain. The Division does not claim that there was a third shipment and there is no question as to the amount of fuel delivered. Accordingly, while the telex messages could be applicable to the second shipment, this would not affect the structure of the underlying transaction.

SMITH). FIRELINE PETROLEUM AGREES TO PURCHASE AND HARBOR PETROLEUM AGREES TO SELL THE HEREIN SPECIFIED COMMODITY UNDER THE TERMS AND CONDITIONS SET FORTH AS FOLLOWS:
COMMODITY: REGULAR LEADED GASOLINE AND UNLEADED

REGULAR GASOLINE.

QUANTITY: MAXIMUM 25,000 BARRELS OF REGULAR LEADED GASOLINE PLUS OR MINUS 10-0/0.
MAXIMUM 25,000 BARRELS OF UNLEADED REGULAR GASOLINE PLUS OR MINUS 10-0/0.

MEASUREMENTS: SELLERS BARGE LOADED
QUANTITY AT LOADING
DOCK.

QUALITY: GOOD COMMERCIAL GRADE - TO MEET ASTM AND NEW YORK
HARBOR SPECIFICATIONS.

DESTINATION: DELIVERED AGWAY
TERMINAL ALBANY, NEW
YORK O/A JULY 19, 1984.

PRICE: \$.955 PER GALLON REGULAR GASOLINE PRICE
INCLUDES ALL
APPLICABLE NEW YORK STATE, FEDERAL AND COUNTY
SALES TAX.
\$1.015 PER GALLON UNLEADED REGULAR GASOLINE
PRICE INCLUDES ALL NEW YORK STATE, FEDERAL AND
COUNTY SALES TAX.

TERMS: AN IRREVOCABLE LETTER OF CREDIT PAYABLE TO
HARBOR
PETROLEUM CORPORATION, 15 LEXINGTON AVENUE,
NEW HAVEN, CONNECTICUT 06513 STATING FUNDS TO
BE WIRED TO H.P.C. BANK ACCOUNT AT CITY TRUST,
961 MAIN STREET, BRIDGEPORT, CONN., ACCOUNT
NUMBER #840-5158, ATTENTION WILLIAM BARNHARDT
UPON LOADED QUANTITY BEING MEASURED BY
INDEPENDANT [sic] INSPECTORS (E.W. SAYBOLT &
COMPANY) PRIOR TO VESSEL LEAVING SELLERS DOCK.
INSPECTION COSTS TO BE SHARED BETWEEN BUYER
AND SELLER.

IT IS FURTHER UNDERSTOOD AND AGREED THAT ALL ORDERS ARE
ACCEPTED SUBJECT TO AVAILABILITY OF PRODUCT TO SELLER AT
THE TIME OF DELIVERY AND SELLER WILL NOT BE LIABLE FOR ANY
DELAY IN PERFORMANCE OR IN DELIVERY OF PRODUCT OR ANY
DAMAGE SUFFERED BY BUYER BY REASON OF SUCH DELAY WHEN
SUCH DELAY IS DIRECTLY OR INDIRECTLY CAUSED BY THE
UNAVAILABILITY OF PRODUCT OR ANY OTHER CAUSE OR CAUSES
BEYOND ITS CONTROL.

BARGE TO BE CONSIGNED TO FIRELINE PETROLEUM UPON RELEASE
OF FUNDS.

PLEASE ADVISE."

(The paragraph providing that Harbor would not be liable for delay beyond its control was inserted on the advice of counsel because of the problem arising from Lesez's delay with the first shipment. It also appears in Harbor's telex of July 3, 1984.)

This offer was accepted by Fireline, although the accepting telex is not in the record. Assuming that the July 3 telex messages did not involve the second shipment, the agreement with Lesez for said transaction is not in the record. However, Lesez issued an invoice to Harbor dated July 18, 1984 stating as follows:

<u>Quantity in Gallons</u>	<u>Description</u>	<u>Unit Price</u>	<u>Total</u>
1,043,755	Regular	\$.88	\$ 918,504.40
1,038,485	No Lead	\$.92	<u>955,406.20</u>
	Total		\$1,873,910.60

The invoice stated that the total included "Federal excise tax, State excise tax, Sales tax, County tax, Gr. Rec. tax, & all applicable taxes". On the invoice were written the words "Product Loaded and Shipped 7/18/84".

On July 18, 1984, Reinauer barge ST-65 was loaded with 1,038,485 gallons of unleaded gasoline and 1,043,755 gallons of regular gasoline at the GATX terminal, Carteret, New Jersey. Reinauer transported the barge to the Agway terminal in Albany where it arrived and was unloaded on July 19, 1984. Harbor paid Reinauer \$22,306.60 for barge transportation. Payment was made for the second shipment in the same manner as it was for the first: when Saybolt verified that the barge was loaded at Carteret, Harbor was paid under Fireline's letter of credit and Lesez was paid under Harbor's letter of credit. Again, Harbor and Fireline shared the costs for the Saybolt inspection.

We find in addition to the facts found by the Administrative Law Judge that Harbor gave no security to Reinauer for payment of the barging costs.

THE AUDIT

In September 1984, an auditor in the Miscellaneous Tax Bureau received a telephone call from New Jersey tax authorities stating that the two barges of gasoline involved in the above transactions had been shipped from New Jersey to New York. The auditor then contacted Harbor and Fireline and requested all information as to the transactions. It was determined that Fireline reported to the State of New Jersey that the above-mentioned bargeloads had been shipped from GATX in Carteret, New Jersey and that a total of 4,155,698 gallons had been delivered to Fireline in Albany, New York. Fireline reported to the New York Department of Taxation and Finance that the gasoline had been purchased "tax paid" from Harbor.

No field audit was conducted. Based on documents submitted and telephone conversations with personnel at Harbor and Fireline, the auditor concluded that Harbor took title to the gasoline at issue in New Jersey and brought it into New York State by barge and was thus the importer of record both for motor fuel tax and sales tax purposes. On September 21, 1984, the Division issued to Harbor a Notice of Determination of Tax Due under Motor Fuel Tax Law for \$333,573.28 in tax and \$16,678.66 in penalty, for a total of \$350,251.94 (the tax was calculated on 4,169,666 gallons at \$.08 per gallon). On November 14, 1984, the Division issued to Harbor and to Lawrence E. Smith, as officer, notices of determination and demands for payment of sales and use taxes due, each providing for \$309,186.21 in sales tax due, \$18,551.17 in penalty and \$5,639.55 in interest, for a total of \$333,376.93.

In September 1984, Harbor's president discussed another transaction with Lesez. A telex sent to Harbor by Lesez on September 11, 1984 at 12:09 Eastern Standard Time offered:

"CONCERNING OUR TELEPHONE CONVERSATION ON 9/11/84
CONCERNING 25,000 BARRELS OF REGULAR GASOLINE AT .885 PER
GALLON AND 5,000 BARRELS OF PREMIUM GASOLINE AT .965 PER
GALLON. PRODUCT TO BE LOADED [sic] ON BARGE PROVIDED BY
HARBOR PETROLEUM.

PAYMENT FOR THE SAID BARRELS TO BE AS FOLLOWS:

HARBOR PETROLEUM CORP. SHALL PROVIDE AN IRREVOCABLE [sic]
LETTER OF CREDIT MADE OUT TO LESEZ PETROLEUM CORP. HARBOR
UPON CONFIRMATION OF LOADING WILL WIRE TRANSFER THE
APPROX. SUM OF \$1,131,900 TO LESEZ PETROLEUM CORP.

HARBOR PETROLEUM CORP. WILL RECEIVE INVOICES FROM LESEZ PETROLEUM CORP. STATING ALL APLICABLE [sic] TAXES ARE PAID.

THANKING YOU IN ADVANCE FOR DOING BUSINESS WITH OUR COMPANY."

Due to the problems with New York State motor fuel and sales taxes resulting in the assessments at issue, the transaction was never consummated.

The State of New Jersey issued an assessment of \$375,674.10 to Harbor with respect to the two shipments. On September 12, 1984, Harbor's accountant wrote to the New Jersey Department of the Treasury submitting copies of the Lesez invoices and other documents requesting that the assessments be cancelled. There is nothing in the record to indicate what happened to the New Jersey assessments.

On or about March 11, 1987, David Bogatin, president of Lesez, pleaded guilty to two counts of a 19-count indictment charging that he evaded sales tax on gasoline purchases. Lesez was indicted for motor fuel tax evasion. The indictments were apparently pending at the time of the hearing. Petitioner Lawrence E. Smith did not contest the allegations that he was a person required to collect tax on behalf of Harbor.

We find in addition to the facts found by the Administrative Law Judge that:

The Department also conducted an audit of Fireline in regard to the motor fuel transactions at issue. The New Jersey Division of Taxation sent the Fireline auditor, James Bennett, a copy of Fireline's July 1984 New Jersey Distributor Report. The New Jersey return was prepared by Fireline and submitted to New Jersey tax officials. Fireline reported to New Jersey that Fireline purchased the gasoline in barges Nos. B85 and ST65.

OPINION

In the determination below the Administrative Law Judge decided that petitioner, Harbor, imported or caused motor fuel to be imported into New York State for distribution or sale within the State. As a result, Harbor was determined to be a distributor within the meaning of Tax Law § 282.1 and Tax Law § 1101(b)(4)(ii)(B) such that it was liable for motor fuel tax and sales and use taxes. Specifically, contracts entered into by Harbor and Fireline were determined to be destination contracts, resulting in a transfer of title to the goods involved in New York

State. Since the transfer of title from Harbor to Fireline was deemed to have occurred in New York State, Harbor was held liable for the aforementioned taxes as a distributor selling automotive fuel at retail.

On exception petitioners contend that (1) the contracts entered into between Harbor and Fireline were shipment contracts resulting in a transfer of title and risk of loss from Harbor in New Jersey, (2) Harbor did not import or cause the motor fuel to be imported into New York State, (3) Harbor was not responsible for determining that the proper tax was paid, (4) Harbor was merely a broker of motor fuel with regard to the transactions at issue and (5) there is not a sufficient nexus with New York State for petitioners to be subject to New York State's taxing powers.

In response the Division argues that (1) the contracts entered into by Harbor and Fireline were destination contracts, (2) Harbor was a distributor of motor fuel primarily liable for the motor fuel and sales taxes at issue, (3) Harbor's failure to inquire about the truth of claims made by its supplier that taxes had been included in the price does not relieve Harbor of its liability for the taxes at issue, (4) Harbor is not relieved of its liability for the taxes at issue by reason of any liability asserted against Fireline and (5) petitioners did have sufficient contacts with New York State to confer personal jurisdiction in the present case.

We affirm the determination of the Administrative Law Judge.

Beginning September 1, 1982 and during the period in issue the retail sales tax on motor fuel was collected on sales by distributors since former Tax Law § 1101(b)(4)(ii) provided in pertinent part that "a sale of automotive fuel by a distributor is deemed to be a retail sale." (L 1982, chs 454 and 469.) Additionally, during the period at issue Tax Law § 282.1 defined a "distributor" as "any person, firm, association or corporation, who or which imports or causes to be imported into the state for use, distribution or sale within the state, any motor fuel" Our task is to determine whether Harbor was a distributor within the meaning of the Tax Law and, if so, whether Harbor as a distributor made sales such that Harbor is liable for the taxes resulting from the sales.

In order to determine whether Harbor was a distributor as defined by the Tax Law we must first ascertain whether Harbor imported or caused to be imported into New York State any motor fuel for use, distribution or sale within the state (Tax Law § 282.1). We agree with the Administrative Law Judge that the terms of the contracts indicate that the contracts were destination contracts as opposed to shipment contracts. While it is true that the shipment contract is regarded as the normal contract under the Uniform Commercial Code, a destination contract arises when the seller agrees to deliver the goods involved to a particular destination (see, U.C.C. § 2-503, Comment 5). The contracts before us indicate that Harbor was to deliver the fuel at issue to the Agway Terminal in Albany, New York, which is identified in the contracts as the destination of the goods. The specific use of the terms "delivery" and "destination" in the contracts cannot be ignored. We find that the use of such precise terms is sufficient to support a finding that the contracts at issue were destination contracts.

Harbor's argument that the contracts were shipment contracts is not persuasive. The use of the precise terms "delivery" and "destination" reflect an intention to enter into a specific destination contract rather than a shipment contract. To consider such precise terms as merely providing an address to which the goods are to be shipped would render the specific meaning of the terms useless. It is an established rule that "[t]echnical words in a contract must be taken in a technical sense unless the context of the instrument or a usage which is applicable clearly indicates a different meaning (Nau v. Vulcan Rail and Construction Co., 286 NY 188, 198). Neither the context of the contract nor the usage of the particular language warrants a different meaning in the present case. Harbor's argument that case law supports an interpretation of the terms in the contracts as though they merely served to provide an address for the shipment of goods is not supported. We find that the specific call for delivery at a specific destination, i.e., Albany, as opposed to a 'ship to' or 'send to' term, is sufficient to overcome the presumption that the contract was a shipment contract. Accordingly, we conclude that the contracts at issue were destination contracts.

Since we have concluded that the contracts at issue were destination contracts, it follows that title to the goods did not transfer from Harbor to Fireline until the goods were delivered to the Agway Terminal in Albany (U.C.C. § 2-401[2][b]; Castle Coal & Oil Co. v. Frank's Fuel, 69 AD2d 795, 415 NYS2d 237). Additionally, Harbor bore the risk of loss for the goods at issue until delivery of them to the Agway Terminal in Albany (U.C.C. § 2-509[1][b]). As a result, we conclude that Harbor was a distributor within the meaning of Tax Law § 282.1 as the facts indicate that Harbor caused the fuel at issue to be imported into New York State for use, distribution or sale within the state.

The conclusion that Harbor was a distributor within the meaning of Tax Law § 282.1 is significant because, as noted earlier, the retail sales tax on motor fuel was collected on sales by distributors during the period at issue, with one exception, pursuant to former Tax Law § 1101(b)(4)(ii). The exception is allowed for "a sale of automotive fuel by a distributor to a purchaser duly registered with or licensed by the taxing authorities of another state as a distributor of or dealer in automotive fuel therein, for immediate exportation from the state into such other state, provided the distributor making such sale complies with all regulations of the tax commission relating thereto." The record does not contain any evidence to support a conclusion that the transaction here falls within the language of the exception. On the contrary, the record indicates that Fireline as the purchaser of the fuel at issue disposed of it within New York State. Accordingly, we conclude that Harbor was responsible for the taxes at issue.

The next issue is whether Harbor should be relieved of its liability for the taxes due under Tax Law §§ 284 and 1105(a) by reason of its failure to inquire as to the truth of claims made by its supplier that taxes were included in the suppliers selling price. Since we have already established that Harbor is a distributor as defined by the Tax Law, it follows that Harbor is primarily liable for filing the necessary returns and timely paying the resulting taxes (Mira Oil Co. v. Chu, 114 AD2d 613, 494 NYS2d 458, app dis 67 NY2d 756, lv app den 68 NY2d 602). The failure by Harbor to inquire as to truth of the claims made by its supplier does not relieve Harbor of its liability for the taxes at issue.

The next issue is whether Harbor had sufficient nexus with New York State to be required to collect and pay the taxes at issue. We conclude that it did. As noted earlier, the facts indicate that Harbor, a registered sales tax vendor with New York State, caused the fuel at issue to be imported into New York State. Further, Harbor continued to retain ownership of the goods at issue as they were being transported in the state to their destination in Albany. Additionally, the sale of the goods at issue by Harbor to Fireline was consummated within the State upon delivery of the goods in Albany to Fireline. We find that such a use of the State by Harbor creates a sufficient nexus with New York State to support the imposition of these taxes. When determining whether a state has the power to impose a tax within the limitations of the Federal Constitution, over a non-domiciliary, the Supreme Court has held that the "simple but controlling question is whether the state has given anything for which it can ask in return" (National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, 386 US 753, 757, quoting, Wisconsin v. J. C. Penney Co., 311 US 435, 444). We conclude that the State of New York may impose the instant taxes because Harbor performed the taxable events in New York State. This case is clearly distinguishable from those in which a use tax was imposed on a non-domiciliary where the subject transaction was consummated outside of the taxing state (see, National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, *supra*; Miller Bros. Co. v. State of Maryland, 347 US 340). As a result, we conclude that sufficient contacts are present such that the Federal constitutional requirements have been satisfied.

Petitioners have argued that the statutory limit of the personal jurisdiction of the New York courts, set forth in sections 301 and 302 of the Civil Practice Law and Rules (CPLR), is the standard that determines whether petitioners can be required to pay the taxes at issue.

We find that if these State jurisdictional limits apply to the case at hand, they have been satisfied. Section 302(a)(1) of the CPLR provides for a jurisdictional basis over a non-domiciliary when such non-domiciliary "transacts any business within the state or contracts anywhere to supply goods or services in the state". We find that the facts, as stated, indicate

that Harbor contracted to supply fuel in New York State. Accordingly, petitioners are subject to personal jurisdiction in New York pursuant to CPLR § 302(a)(1).

Petitioners reliance on the case of McGowan v. Smith (52 NY2d 268, 437 NYS2d 643) is misplaced. In McGowan it was not made clear that the defendant utilized the State of New York as the destination for the sale of the goods at issue, while it is clear that New York was the destination in the present case. Further, as the Court of Appeals noted, in McGowan the Court did not have the occasion to consider the 1979 amendment to CPLR § 302(a)(1), which extended the exercise of personal jurisdiction over non-domiciliaries to those who contract "anywhere to supply goods or services in the state". Since the complaints had been served prior to such amendment, the amendment was not before the Court for its consideration (McGowan v. Smith, *supra*, 437 NYS2d 643, 644 [footnote 2]). Thus, the decision in McGowan is clearly distinguishable from the present case on both the facts and the law.

The last issue which we will address is petitioners' claim that the audit of Harbor was arbitrary and capricious and invalid. Petitioners principal argument on this point appears to be that if the auditor had done a more thorough investigation he would not have caused assessments to be issued against petitioners. By challenging the auditor's conclusion that Harbor imported motor fuel into New York State, petitioners have not established that the audit methodology was unreasonable or the amount assessed incorrect (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 446 NYS2d 451). The facts are that the auditor requested and received all information necessary to a determination of taxes due. From the documents requested and presented, the exact gallonage of the fuel which Harbor caused to be imported into New York was ascertained. In addition documents were presented, which we have previously discussed, which indicate that Harbor was responsible for the importation of the fuel at issue into New York State. Thus, we conclude that the audit was reasonable and properly determined the exact amount of tax due.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners, Harbor Petroleum Corporation and Lawrence E. Smith as an officer of such corporation are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Harbor Petroleum Corporation and Lawrence E. Smith as an officer of such corporation are granted to the extent indicated in conclusions of law "G" and "H" of the Administrative Law Judge's determination but are in all other respects denied; and
4. The Notice of Tax Due issued on September 21, 1984 and the notices of determination issued on November 14, 1984 shall be modified accordingly by the Division of Taxation, but such notices are otherwise sustained.

DATED: Troy, New York
September 21, 1989

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner