STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MENDON LEASING CORP.	:	DECISION
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 December 1, 1980 through November 30, 1984.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 27, 1989 with respect to the petition of Mendon Leasing Corp., 362 Kingsland Avenue, Brooklyn, New York 11222 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 December 1, 1980 through November 30, 1984 (File No. 802763). Petitioner appeared by Kaye, Scholer, Fierman, Hays & Handler (Steven J. Greene, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Both parties filed briefs on exception. Oral argument at the request of the Division was heard on March 14, 1990.

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

ISSUE

Whether petitioner should be allowed a credit for sales taxes paid to its fuel distributor on gasoline that was later sold to petitioner's truck lease customers between September 1, 1982 and November 30, 1984, upon which it collected and remitted sales tax.

FINDINGS OF FACT

The facts in this case are the result of a stipulation entered into by the parties pursuant to 20 NYCRR 3000.7 and additional findings of facts made by the Administrative Law Judge. We find the facts as contained in the stipulation and as found by the Administrative Law Judge.

STIPULATION OF FACTS

1. Petitioner, Mendon Leasing Corp., is a truck leasing company incorporated under the laws of New York State with its principal place of business in Brooklyn, New York. During the period in issue, it providedtrucks to various customers under one of two types of truck lease and service agreements. The typical term for both types of leases was five years.

2. Under the first type of truck lease and service agreement, known as an "x-fuel lease", the customer was responsible for providing fuel at its own cost.

(a) Before September 1, 1982, petitioner provided its fuel distributor with a resale certificate and, accordingly, did not pay sales tax to the distributor. During this period, customers who leased trucks under an x-fuel lease were separately billed by petitioner for any fuel (gasoline and diesel) that petitioner provided to the customer. Sales tax was collected on these separate fuel billings and paid over to the New York State Department of Taxation and Finance.

(b) From September 1, 1982 to May 31, 1983, petitioner collected (and paid to New York State) sales tax from its customers on all of its separate fuel billings under x-fuel leases. In addition, petitioner paid sales tax on its purchases of gasoline from its fuel distributor. The actual sales tax paid to the distributor was taken as a credit in petitioner's sales tax accrual account.

(c) From June 1, 1983 to the end of the period in issue, petitioner paid sales tax to its distributor on all gasoline purchases. Petitioner collected (and paid to New York State) sales tax from its customers under x-fuel leases on only diesel fuel billings.

3. Under the second type of truck lease and service agreement, known as a "wet lease", petitioner provided fuel at its own cost. These costs were included in the lease rate charged to the customer.

(a) Approximately 60 percent of petitioner's truck leases with customers were "wet leases".

(b) Before September 1, 1982, petitioner provided its fuel distributor with a resale certificate and, accordingly, did not pay sales tax to the distributor.

From September 1, 1982 to the end of the period in issue, petitioner paid sales tax to its fuel distributor on all gasoline purchases. During this period, the lease charges paid by customers under wet leases included petitioner's cost of gasoline. Sales tax was, in turn, collected (and paid to New York State) on such lease charges. Consequently, petitioner paid sales tax twice on gasoline provided under wet leases.

(c) The actual sales tax paid to petitioner's distributor on gasoline from September 1, 1982 to May 31, 1983 was taken as a credit in petitioner's sales tax accrual account.

(d) From June 1, 1983 to the end of the period in issue, the sales tax paid to the distributor on the amount of gasoline provided to petitioner's customers under wet leases was taken as a credit in petitioner's sales tax accrual account. During this period, petitioner paid a total of $281,581.13 in sales tax to its distributor on gasoline purchases of 2,673,367 gallons. Petitioner provided approximately 1,652,871 gallons of this gasoline to its customers under wet leases. Because petitioner was charging sales tax on the total billings under wet leases, which billings included a charge for the price of gasoline paid to petitioner's distributor, petitioner collected, and paid to New York State, sales tax on the 1,652,871 gallons of gasoline provided to its wet lease customers. Petitioner took as a credit the amount of sales tax paid to its distributor on the 1,652,871 gallons of gasoline.

(e) Customers under wet leases were typically billed monthly. In addition to a fixed weekly lease rate, such customers were charged for the total miles traveled by the leased truck during the month. The per-mile rate that petitioner charged the customer was set forth in Schedule "A" of the wet lease. This rate included an amount for fuel consumption and a basic mileage charge.

(f) Petitioner also charged customers under wet leases for any increases in petitioner's fuel costs that occurred during the lease period. The rate of adjustment for each $0.01 increase in petitioner's fuel cost per gallon was set forth in Schedule "A" of the wet lease.

4. The total amount of sales and use taxes that the Division of Taxation alleges petitioner owes arises solely from the credits discussed in paragraphs 2(b), 3(c), and 3(d) of the stipulation. These credits were for sales tax paid by petitioner to its fuel distributor on gasoline that petitioner subsequently provided to its customers (under both x-fuel and wet leases) and on which petitioner collected and (again) paid sales tax. The credits thus ensured that petitioner would pay sales tax once and only once on gasoline purchased from its distributor and provided to its truck lease customers.

5. In an examination of petitioner's sales and use tax returns for the period in issue, the Division of Taxation took the position that petitioner was not entitled to the credits against its sales tax accrual account for the transactions described in paragraphs 2(b), 3(b), 3(c), and 3(d) of the stipulation. On September 11, 1985, the Division of Taxation issued notices of determination and demands for payment of sales and use taxes due in the aggregate amount of $236,661.26 plus interest for the period December 1, 1980 through November 30, 1984.

6. On November 12, 1985, petitioner filed a petition with the former State Tax Commission, objecting to the notices of determination.

7. On January 20, 1987, petitioner filed a withdrawal of petition for a portion of the Division's proposed determination. Of the $236,661.26 total determination, petitioner agreed to pay $22,934.11 plus interest and the Division of Taxation cancelled $2,399.16. Petitioner continued to disagree with the remaining $211,327.99 determination.

8. On June 10, 1987, petitioner filed a perfected petition in light of the previous withdrawal of petition.

The following additional findings of fact are made by the Administrative Law Judge.

The field audit report provided the following detail concerning the determination by the Division of Taxation that petitioner owed additional sales tax with regard to its sales tax accrual account. "The vendor erroneously deducted $235,159.73 from the sales tax accrual account. This was primarily based on the fact that on lease contracts that included gasoline, the vendor would combine these two types of sales and charged [sic] sales tax thereon. The vendor subsequently deducted sales tax from the accrual account to recoup the sales tax he had paid to his distributor."

The record on submission does not allocate the claimed credit for sales tax paid by petitioner on its purchases from its fuel distributor of $211,327.99 between the sales tax collected on sales of motor fuel (1) to x-fuel lease customers and (2) to wet lease customers.

An example of a fuel billing by petitioner to an x-fuel lease customer provided by the parties as an exhibit to the stipulation shows the computation of a "charge for fuel supplied by Mendon locations" as consisting of 78.3 gallons at $1.20 per gallon for an amount totalling $93.96. Sales tax of $7.75 is separately shown and added for an invoice total of $101.71.

OPINION

Former Tax Law section 1111(e)(4) provided that:

> "Nothing in this article shall be construed to require the payment of the taxes imposed pursuant to this article or authorized to be imposed pursuant to article twenty-nine of this chapter more than once on automotive fuel sold within the state. The taxes so imposed and authorized to be imposed, though payable to the distributor, shall be borne by the user or consumer of automotive fuel; and when the foregoing taxes are paid to the distributor shall be deemed to have been so paid for the account of the user or consumer; and the price paid by such user or consumer for such fuel, provided such price is not less than the amount of the taxes imposed thereon, shall be presumed to include such taxes." (Emphasis added.)

The regulations of the Commissioner provide that:

> "Automotive fuel subject to the taxes imposed by article 28 and pursuant to the authority of article 29 of the Tax Law, sold to any person where such fuel has previously been taxed as automotive shall not be taxed more than once. In such instances, the fuel is to be sold sales tax included. The sales tax imposed upon the sale of automotive fuel previously paid to the distributor is deemed to have been so paid for the account of the ultimate user or consumer and such tax therefore is required to be passed through to and borne by all purchasers purchasing such fuel subsequent to the initial sale by the distributor as provided in section 560.7 of this Part. However, nothing herein shall prohibit the imposition of the sales and use taxes imposed upon the sale or use of automotive fuel even though such fuel may previously have been subject to the taxes imposed upon the sale or use of tangible personal property, but a credit or refund may be allowed for tax previously paid on the sale of tangible personal property." (20 NYCRR 560.3[b][2].) (Emphasis added.)

The regulations of the Commissioner also provide that:

> "With respect to sales of automotive fuel, the taxes imposed by article 28 and pursuant to the authority of article 29 of the Tax Law, shall be paid only once . . . However, nothing herein shall prohibit the imposition of the sales and use taxes imposed upon the sale or use of automotive fuel even though such fuel may previously have been subject to the taxes imposed upon the sale or use of tangible personal property, but a credit or refund may be allowed for tax previously paid on the sale of tangible personal property." (20 NYCRR 560.7[a].) (Emphasis added.)

The critical fact in this case, stipulated to by the parties, is that sales tax was imposed more than once on the gasoline provided as part of the wet lease, i.e., the petitioner paid tax to its distributors on all gasoline purchases and it collected tax on the full price of such wet leases which included petitioner's cost of gasoline. Petitioner took as a credit in its sales tax accrual account the actual sales tax paid to its distributor.

The crux of the matter is whether petitioner was entitled to the sales tax credits. Resolution of the issue turns on whether Tax Law section 1111(e) former (4) was applicable under the facts of this case.

The Administrative Law Judge distinguished petitioner's collection of taxes on its wet leases from the x-leases on the ground that in the wet leases petitioner was obligated to collect tax on the total lease charge including the gasoline, whereas in the x-lease there was no obligation or authority to collect tax on the direct sale of gasoline by petitioner to its customers.

Under these circumstances the Administrative Law Judge determined that imposition of sales tax on the total wet lease charges, including the gasoline cost, was proper under the

definition of sale at section 1101(b)(5) and that imposition of the tax on the gasoline involved in such leases would result in double taxation of such gasoline, contrary to the express provisions of Tax Law former section 1111(e)(4) in effect during the period at issue.

On exception, the Division, relying on the decision of this Tribunal in Matter of Fourth Day Enterprises (Tax Appeals Tribunal, October 27, 1988), asserts that the incidence of the tax was on the retail sale of the gasoline and that the retail sale of gasoline in this case occurred when the distributor sold to petitioner, a non-distributor. The wet lease transactions, thus, were not "retail sales" and petitioner was not authorized to collect tax upon them. Since there was no sale, the Division asserts that the Administrative Law Judge erred in applying section 1111(e) former (4). The Division further asserts that under section 1105(a), petitioner was required to collect sales tax on the total lease charge and that there are no statutory or regulatory provisions which allow the sales tax accrual account credits claimed by petitioner.

On exception, petitioner asserts that the determination of the Administrative Law Judge is correct; that there was a sale of the gasoline by petitioner as part of its wet leases and that without the credit such gasoline would have been taxed twice, contrary to the provisions of section 1111(e)(4) and 20 NYCRR 560.7(a).

We affirm the determination of the Administrative Law Judge.

We deal first with the Division's assertion that the Administrative Law Judge incorrectly applied section 1111(e) former (4) and the regulations of the Commissioner (20 NYCRR 560.7). The thrust of the Division's assertion is that "the statute and the regulation apply to automotive fuel sold within the state but [the Administrative Law Judge] had already found that [petitioner] did not sell the fuel but instead included it as a part of the lease." (Division's brief on exception, p. 4.)

We are not persuaded by the Division's argument. The gasoline provided by petitioner to its wet lease customers was sold within the State by petitioner's fuel distributor to petitioner. Petitioner paid tax on that gasoline to its distributor. That same gasoline was subject to tax as part of the wet lease. In short, as the facts stipulated to by the parties indicate, tax was imposed

twice on gasoline provided under the wet leases.[1] This is enough, in our view, to make applicable the explicit provisions of former section 1111(e)(4) which, to restate, provide that nothing in Article 28 of the Tax Law, the sales tax article, "shall be construed to require the payment [of sales tax] . . . more than once on automotive fuel sold within this state." The Division's efforts to construe other portions of Article 28 as requiring the double taxation of the automotive fuel at issue flies in the face of the explicit language of this section. Further, since the section was enacted as part of the restructuring of the sales tax on gasoline, its ameliorative purpose, i.e., to prevent double taxation of gasoline, is appropriate to the facts of this case where it is acknowledged by both parties that petitioner paid sales tax twice on gasoline provided under wet leases. We point out that prior to the restructuring of the tax (prior to September 1, 1982) petitioner did not pay tax to its distributor, but instead provided it with a resale certificate. Petitioner did collect and remit sales tax on the full charge of its wet leases including its cost of gasoline. The restructuring of the tax created the double taxation at issue. It is quite reasonably argued that former section 1111(e)(4) was intended to prevent double taxation where none existed before.

We deal next with the Division's assertion that this Tribunal's decision in Matter of Fourth Day Enterprises, (supra), is supportive of its argument in this case. We disagree. The issue in Matter of Fourth Day Enterprises, (supra), did not involve the double taxation of gasoline and the application of former section 1111(e)(4). The issue there was whether the taxpayer was entitled to a refund because the price it paid for the gasoline when purchased from its distributor and upon which the tax was based was higher than the sale price of the gasoline to its customers. We held there that the retail sales tax on motor fuel was collected on sales by distributors to non-distributors, that the sale by a non-distributor was not a retail sale for purposes of the tax and that the tax paid by the taxpayer therein was to be passed on to the customer. The taxpayer in that

[1]We note that "all expenses . . . incurred by a vendor in making a sale, regardless of their taxable status . . . are not deductible from the receipts." (Tax Law § 1101[b][3]; 20 NYCRR 526.5[e].) Thus, under the statute and Commissioner's regulations, petitioner here was required to collect tax on the gasoline included as part of the wet leases.

case did not claim a refund on the basis of double taxation as here. We were not called upon to interpret the explicit language of former section 1111(e)(4).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Mendon Leasing Corp. is granted to the extent indicated in conclusion of law "6" of the Administrative Law Judge's determination; and

4. The Division of Taxation shall modify the Notices of Determination dated September 11, 1985 in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
August 23, 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