STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GASIT, INC.	:	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 January 1, 1983 through April 30, 1985.	:	
	:	

Petitioner, Gasit, Inc., 791 North Bedford Road, Bedford Hills, New York 10507 and the Division of Taxation filed exceptions to the determination of the Administrative Law Judge issued on August 3, 1989 with respect to a 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 January 1, 1983 through April 30, 1985 (File No. 803320). Petitioner appeared by Mortimer Todel, Esq. 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 parties was held on January 31, 1990.

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

ISSUES

I. Whether the Administrative Law Judge properly determined that petitioner's petition was timely because the Division failed to prove when it mailed a denial of refund claim to petitioner.

II. Whether the Division's denial of petitioner's claim for refund of sales tax paid to its supplier of gasoline for the period in question was proper.

III. Whether chapters 454 and 469 of the Laws of 1982 violate the equal protection provisions of the New York State and United States Constitutions.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we modify finding of fact "5" as stated below.

Petitioner, Gasit, Inc., operated an automobile service station and convenience store located in Bedford Hills, New York which sold gasoline,groceries and cigarettes at retail. During the period in issue, petitioner purchased gasoline from its supplier, ARCO Petroleum Products Co. ("ARCO"), and paid sales tax to ARCO on such purchases based on the regional average retail sales price for gasoline. Thereafter, petitioner sold the gasoline to its retail customers at a price lower than the regional average retail sales price.

On or about December 31, 1985 and May 19, 1986, petitioner filed two applications for refund of prepaid sales tax on motor fuel sold by retail service stations as follows:

DATE FILED	PERIOD	REFUND CLAIMED
December 31, 1985	January 1, 1983 - December 31, 1983	$11,149.61
May 19, 1986	January 1, 1984 - April 30, 1985	$23,284.60

In conjunction with its applications for refund of sales tax, petitioner submitted schedules which showed the sales tax due, the sales tax paid to petitioner's supplier and the sales tax which would be due if calculated on petitioner's actual retail sales price. The amount of sales tax was apparently based on the combined New York State and Westchester County tax rate. Petitioner's refund claims were premised upon the assertion that the tax payments to the supplier exceeded the amount of tax which would be due if computed on petitioner's actual retail sales.

During the period at issue, petitioner's sales tax payments to ARCO on the purchase of gasoline exceeded the amount of sales tax which would be due if computed based upon petitioner's actual retail sales of gasoline.

We modify the Administrative Law Judge's finding of fact "5" as follows:

> In response to the application for refund filed on December 31, 1985, the Division of Taxation, by letter, notified petitioner of its determination to deny the refund claim. The letter (petitioner's Exhibit 1) did not have a date typed on it but bore a stamped date of February 24, 1986. In response to the application for refund filed on May 19, 1986, the Division, by letter, denied petitioner's refund claim. The letter (Division's Exhibit D) did not have a date typed on it but bore a stamped date of June 23, 1986. Neither letter specified the period for which refund was denied. Both letters were addressed to petitioner and were identical in content and stated as follows:
>
> > "Please be advised that your claim for a refund of sales tax is hereby being denied in full.
> >
> > "Your claim for a refund of sales tax paid on the purchase of motor fuel is being denied for the following reasons.
> >
> > "1. According to the information you sent the distributor correctly computed and collected the sales tax due on the gasoline you purchased.
> >
> > "2. For the period of time involved in the claim, the sales tax was required to be collected from the retail outlets as they were held to be the consumer of the gas purchased. There was no provision in the law to allow the stations to collect tax from their customers and take credit for tax prepaid.
> >
> > "This determination denying your claim in full shall be final and irrevocable unless you apply to the State Tax Commission for a hearing within ninety (90) days from the date of this letter in accordance with the provisions of Section 1139(b) of the Tax Law."[1]

The Division did not present any evidence of mailing of the refund denials to petitioner.

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[1] The Administrative Law Judge's finding of fact "5" read as follows:

> "In response to the application for refund filed on December 31, 1985, the Division of Taxation, by letter dated February 24, 1986, notified petitioner of its determination to deny the refund claim. In response to the application for refund filed on May 19, 1986, the Division, by letter dated June 23, 1986, again denied petitioner's refund claim. On both occasions, the Division took the position that the Tax Law does not allow a refund under the circumstances presented. The letters did not specify the period or amount of the refund claim."

We modify this fact to more fully reflect the record.

On or about May 27, 1986, petitioner filed a petition with the former Tax Appeals Bureau protesting the refund denial dated February 24, 1986. The petition refers to the period in issue as January 1, 1983 through April 30, 1985. Petitioner contends it never received the denial letter dated June 23, 1986 and only became aware of its existence at the hearing.

OPINION

The Administrative Law Judge determined that since the Division did not prove proper mailing of the refund denial dated June 23, 1986, the time period for filing a petition contesting such denial was not triggered and petitioner is entitled to a hearing on its refund application for the period January 1, 1984 - April 30, 1985, filed on May 19, 1986.

The Administrative Law Judge also determined that there was no basis for petitioner's assertion that it is entitled to a refund based on the difference between the price it paid for gasoline and its selling price to the ultimate consumer and that chapters 454 and 469 of the Laws of 1982 are presumed to be constitutional.

In its exception the Division has abandoned its assertion that petitioner did not timely file a petition contesting the denial dated June 23, 1986 and instead asserts that the Tribunal has no jurisdiction over the matter because petitioner denied receiving the June 23 denial letter.

Petitioner asserts its petition was timely and that chapters 454 and 469 are unconstitutional.

We affirm the determination of the Administrative Law Judge.

We deal first with the Division's assertion on exception that the Administrative Law Judge erred in determining that petitioner's petition for the period January 1, 1984 - April 30, 1985 was timely filed.

A brief review of the pertinent events may be helpful in understanding the Division's position.

On December 31, 1985, petitioner filed a refund application for the period January 1, 1983 - December 31, 1983.

The Division denied this application by letter dated February 24, 1986 (Petitioner's Exhibit 1).

On May 19, 1986, petitioner filed a refund application for the period January 1, 1984 - April 30, 1985.

On or about May 27, 1986, petitioner filed its petition for refund for both periods.

The Division denied the second refund application by letter dated June 23, 1986 (Division's Exhibit D).

At the hearing on this matter, the Division's position was that the petition was not valid for the latter period because it was filed before the refund was denied. The Administrative Law Judge concluded that the petition was timely because the Division did not submit evidence with respect to the mailing of the denials. On exception, the Division has modified its approach; it now argues that the Tribunal does not have jurisdiction over the second refund application because petitioner claims that it did not receive the second denial letter.

We conclude that the receipt of the second denial is irrelevant here. Petitioner received the first denial letter. There is nothing in the first denial letter which limits its application to any particular period or any particular refund claim. The Division did not establish when this first denial letter was mailed. The date stamped on the letter is clearly not proof of when it was mailed (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990; August v. Commr., 54 TC 1535, 1536). We conclude, therefore, that the first denial letter was received by petitioner after it mailed its second refund request and was a denial of petitioner's refund claims for both periods. Therefore, petitioner's petition filed on or about May 27, 1986 was a timely petition for both refund claims filed by it and the Tribunal has jurisdiction over the refund claims for both periods.

While our conclusion resolves the issue of timeliness of petitioner's petition as raised by the Division, we, nevertheless, find it necessary and appropriate to briefly comment on the manner in which the issue was raised by the Division in this case.

This Tribunal is charged by statute with the responsibility "for providing the public with a just system of resolving controversies with the department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). Our ability to carry out this responsibility is dependent, in large part, on each party timely filing responsive pleadings which clearly apprise the Tribunal, as well as the opposing party, of their position with respect to the relevant facts, issues and applicable law in the case.

Here, the Division's assertion that petitioner's petition was untimely was not addressed in the Division's answer to petitioner's petition but was raised for the very first time in the Division's summation at the conclusion of the hearing.[2] We recognize that issues relating to the jurisdiction of this Tribunal can and should be raised during proceedings before us. However, we are also concerned that both parties to a proceeding, and the Tribunal itself (including the Administrative Law Judge before whom the hearing is held) are adequately and timely apprised of such issues so that they can deal with them appropriately in the context of the hearing process.

Under the circumstances in this case it is extremely doubtful whether petitioner and its representative were appropriately apprised of the issue and afforded the opportunity to properly respond to it at hearing. Moreover, the issue was certainly not presented to the Administrative Law Judge as one pertinent to the facts to be established during the course of the hearing. We are at a loss to understand how an issue so directly related to petitioner's claim for refund and so fundamental to this Tribunal's jurisdiction could be treated in what can only be described as a haphazard fashion at hearing.

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[2]The Division's attorney stated, "I should also mention and perhaps I will make a formal motion on this point, too, that . . ."

* * *

"The petition should only technically affect the refund application for 1983 and cannot include the denial of the refund application for January 1, 1984 through April 30, 1985 since the petition was filed before the denial of the '84/'85 refund application. For that reason I move this matter not address the '83 refund application." (Tr p 71.)

We deal next with the merits of petitioner's plea for refund for the periods in question.

In Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988, this Tribunal, under similar circumstances, reviewed the legislative history of the tax laws here at issue. In brief, prior to September 1, 1982, sales tax on motor fuel was imposed and required to be collected on each gallon of gasoline sold at retail service stations (former Tax Law § 1111[d] and [e]). The tax was imposed at the combined state (4%) and applicable local rate, if any. The rate was applied to the actual selling price. Thus, each individual service station was required to collect and remit the tax.

Beginning September 1, 1982 (L 1982, chs 454 and 469) and during the period in issue here, June 2, 1983 through May 30, 1985, the retail sales tax on motor fuel was collected on sales by distributors to non-distributors, such as retail service stations, since former Tax Law § 1101(b)(4)(ii) provided that "a sale of automotive fuel [including motor fuel] by a distributor is deemed to be a retail sale."[3] The tax was, thus, generally imposed at a higher point in the distribution chain than the point of sale by the service station. The rate of tax was the same as under prior law, but the price to which it applied was not the actual selling price. For part of the period, the tax was calculated on a statewide average retail markup (former Tax Law § 1111[e][1], as amended by L 1982, ch 454); for the remainder of the period it was calculated on a regional average retail sales price (former Tax Law § 1111[e]]1], as amended by L 1982, ch 930). In either event, the tax collected by the distributor was included in the cost to the service station and passed through to the ultimate consumer (former Tax Law § 1111[e][4]). The price shown on the pump was to include the tax so paid (former Tax Law § 1111[d]).

Pursuant to former Tax Law § 1111(d) and (e), the service station passed through the tax which it paid to its supplier to its purchasers. There was no provision for service stations to collect a tax based upon their actual selling prices. If the actual sales price was higher than the "regional average retail sales price", the retail service station owner was not liable for additional

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[3]Tax Law § 1101(b)(4)(ii)(B) as relevant here, defined 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 . . ." and was in effect until its revision took effect on June 1, 1985.

tax due. Conversely, if the actual sales price was lower than the "regional average retail sales price", no refund was due. The concept was that the amount of the tax was fixed, paid over and passed on to the consumer irrespective of the actual selling price. Under the tax collection system then in place, the retail sale had occurred for sales tax purposes when the motor fuel was sold by the distributor. There was no provision for refund to a retail service station.

We find our decision in Fourth Day controlling here and agree with the Administrative Law Judge's determination denying the petitioner's application for refund.

We deal next with petitioner's assertion that the laws in question are unconstitutional. The jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass constitutional challenges. It is presumed that statutes are constitutional and that chapters 454 and 469 of the Laws of 1982 in particular are constitutional (see, Matter of Fourth Day Enterprises, supra; Matter of Jones, State Tax Commn., June 29, 1983; see also, Matter of Tampa Marketing Corp., State Tax Commn., February 13, 1980).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gasit, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Gasit, Inc. is denied; and

4. The denial of petitioner's refund claims is 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