

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FOURTH DAY ENTERPRISES, INC.	:	DECISION
	:	DTA NO. 803782
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 June 2, 1983	:	
through May 30, 1985	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on February 4, 1988 with respect to a petition by Fourth Day Enterprises, Inc., 36 Crescent Hill Road, Pittsford, New York 14534. The petition was filed 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 June 2, 1983 through May 30, 1985 (File No. 803782). Petitioner appeared by Mousaw, Vigdor, Reeves, Heilbronner & Kroll, Esqs. (Joseph A. F. Valenti, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was not requested.

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

ISSUE

I. Whether Chapter 44 of the Laws of 1985 authorizes a refund of sales tax paid on the purchase of motor fuel by a service station operator from a distributor during the period June 2, 1983 through May 30, 1985, to the extent that such tax exceeds the amount that would be due if the tax were calculated based on the price at which the service station sold the motor fuel.

II. Whether Chapters 454 and 469 of the Laws of 1982 violate the equal protection and due process provisions of the State and Federal Constitutions.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference except that finding of fact "3" is modified as stated below.

Petitioner operates a service station which sold gasoline at retail. During the period in issue, petitioner purchased gasoline from its supplier and paid sales tax to its supplier on such purchases based on the regional averagesales prices 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 April 17, 1986 petitioner, Fourth Day Enterprises, Inc., filed three applications for credit or refund of state and local sales or use tax as follows:

<u>PERIOD</u>	<u>REFUND CLAIMED</u>
June 2, 1983 - December 31, 1983	\$ 2,328.25
January 2, 1984 - December 30, 1984	15,120.57
January 2, 1985 - May 30, 1985	4,424.24

Finding of fact "3" is modified to read as follows:

In conjunction with its applications for refund of sales tax, petitioner submitted a schedule which showed the sales tax which would be due if calculated on petitioner's actual retail sales price and the sales tax paid to petitioner's supplier. The amount of sales tax was apparently based on the combined New York State and Monroe County tax rate. Petitioner's refund claim was 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.

By a letter dated May 2, 1986, the Division denied petitioner's applications for refund, taking the position that the Tax Law does not allow a refund under the circumstances presented.

OPINION

The first issue in this case is one of statutory interpretation. In short, whether the Legislature, by enacting Chapter 44 of the Laws of 1985 which revised the system of collection of sales tax on motor fuel, intended that petitioner and those similarly situated be entitled to a sales tax refund for motor fuel sold under the prior system for the period at issue (June 2, 1983 through May 30, 1985). While the principal section of law involved is section 42 of Chapter 44 of the Laws of 1985, the

effective date section of the new law, a brief review of the legislative history concerning the imposition of sales tax on motor fuel will be helpful in resolving the issue in this case.

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. Each individual service station, thus, 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 section 1101(b)(4)(ii) provided that "a sale of automotive fuel [including motor fuel] by a distributor is deemed to be a retail sale."¹ 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]).

No refund or credit was provided to a service station based upon any difference between the average retail sales price and a service station's actual sales price since the service station was not required to collect a different amount of tax upon its sale at the pump. The retail sales tax had been

¹Tax 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.

paid by the distributor and this tax was to be passed through to the service station and to the ultimate consumer pursuant to former Tax Law section 1111(d), (e).

Chapter 44 of the Laws of 1985, generally effective June 1, 1985, substantially revised the system for collection of the sales tax on motor fuel and introduced a new concept, i.e., a prepaid sales tax. As added by Chapter 44 of the Laws of 1985, section 1102(a) of the Tax Law provided:

"Every distributor shall prepay, on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, a tax on each gallon of motor fuel (i) which he imports or causes to be imported into this state for use, distribution, storage or sale in the state or produces, refines, manufacturers or compounds in this state or (ii) if the tax has not been imposed prior to its sale in this state, which he sells" (Emphasis added.)

Chapter 44 divided the state into two regions for purposes of the imposition of the tax: a downstate region consisting of the Metropolitan Commuter Transportation District and an upstate region consisting of the remainder of the State (see, Tax Law { 1111[e][1], as added by L 1985, ch 44, { 22). The prepaid tax was imposed at the rate of 7% upon the regional average retail sales price established by the Energy Commissioner for the downstate region and at the rate of 6% upon the regional average retail sales price established by such Commissioner for the upstate region (Tax Law { 1111[e][2], as amended L 1985, ch 44, { 22).

Section 18 of Chapter 44 of the Laws of 1985 amended section 1101(b)(4)(ii) to delete the special definition of "retail sale" that had deemed the sale of automotive fuel by a distributor to be a retail sale. Accordingly, on and after June 1, 1985, service stations were required to collect the tax imposed by section 1105 upon their sales of motor fuel to consumers based upon the combined state and local sales tax rate in effect in the particular locality and the actual sales price.

Tax Law section 1101(b)(4)(ii), as amended by Chapter 44 of the Laws of 1985, provided that the prepaid tax was to be passed through on purchases as follows:

". . . no motor fuel shall be sold in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid"

Pursuant to Tax Law section 1120(a)(1), as added by section 26 of Chapter 44 of the Laws of 1985, a service station was allowed a refund or credit for the prepaid sales tax thus included in its

cost against the retail sales tax which it was required to collect on and after June 1, 1985, as follows:

"A vendor of motor fuel who or which is required to collect the taxes imposed by subdivision (a) of section eleven hundred five of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter shall be allowed a refund or credit against the amount of tax collected and required to be remitted to the tax commission pursuant to the provisions of section eleven hundred thirty-seven of this article upon the retail sale of motor fuel in the amount of the tax on such motor fuel prepaid by or passed through to and included in the price paid by such vendor pursuant to the provisions of section eleven hundred two of this article." (Emphasis added.)

This provision was designed to allow a credit or refund depending on whether the tax actually collected by the retail service station on the sale of motor fuel was more or less than the prepaid tax included in its purchase price from the distributor.

Section 42 of Chapter 44 of the Laws of 1985, which stated the effective date of the act, also addressed the transition from the old system to the new system of tax collection. The Legislature recognized that vendors would have in their inventory on June 1, 1985 motor fuel upon which the tax would have been paid under the former system of tax collection and upon which the tax would be imposed under section 1105 of the Tax Law upon a sale to a consumer. To prevent the tax from being imposed more than once with respect to such motor fuel, section 42 provided as follows:

"This act shall take effect immediately, except that sections one through thirty-six shall take effect June first, nineteen hundred eighty-five and shall apply to all taxable events respecting motor fuel as such events are defined in section eleven hundred two of the tax law, as amended by this act, and automotive fuel occurring on and after such date and an amount equivalent to the sales taxes paid by or passed through to a purchaser upon sales of motor fuel before such date at the regional average retail sales price pursuant to the provisions of articles twenty-eight and twenty-nine of the tax law in effect prior to such date shall be allowed such purchaser as a credit or refund, where a refund or credit would be allowable after such date under the tax law, as amended by this act, against the tax required to be prepaid pursuant to section eleven hundred two and passed through or required to be collected or paid pursuant to section eleven hundred five or eleven hundred ten of the tax law upon sales or uses of such motor fuel occurring on and after such date and provided further, however, that no refund or credit shall be allowed pursuant to this provision with respect to motor fuel placed into the ordinary fuel tank connected with the engine of such vehicle prior to such date notwithstanding use of such fuel thereafter." (Emphasis added.)

The Administrative Law Judge construed the language in section 42 as authorizing a credit for all sales taxes paid by or passed through to a vendor upon his purchase of motor fuel for the period December 1, 1982 to June 1, 1985, which includes the June 2, 1983 to May 30, 1985 period for which the petitioner requests a refund, to the extent such taxes exceeded the taxes collected by the vendor on his sales of the motor fuel. The Administrative Law Judge determined that the Division erred in concluding there was no authority to consider petitioner's refund application. We reverse the determination of the Administrative Law Judge.

The Administrative Law Judge's determination that the provisions of section 42 of Chapter 44 of the Laws of 1985 relating to the refund or credit constitute a remedial measure and should be applied retroactively to the entire period at issue rests upon a false premise. The determination assumed that service stations were collecting a tax upon their sales at the pump on a basis other than that which they paid to their suppliers. This was not the case during the period at issue.

Pursuant to former Tax Law section 1111(d), (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 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. The new system adopted in 1985 made the actual sales price the controlling factor as well as the rate of taxation applicable in a retailer's locale. The language relied upon by the Administrative Law Judge was needed to make the transition to the new system. This language read in conjunction with Tax Law section 1120(a)(1), allows a refund or a credit of the tax paid under the former system of tax collection against the tax which, under the new system, the service station is now required to collect and remit upon his sale (Tax Law { 1105). Otherwise, the motor fuel would be taxed twice: first, on the sale by the distributor based upon the special definition of "retail sale"

applicable from September 1, 1982 through May 31, 1985 and second upon the sale by the service station which after June 1, 1985, constitutes a retail sale of motor fuel (Tax Law { 1101[b][4]}).

Statutes should be read in context and all parts of an act should be construed together (McKinney's Cons Laws of NY, Book 1, Statutes, { 97}). Chapter 44 of the Laws of 1985 changed the system of sales tax collection with respect to motor fuel to address evasion in the previous system (Memorandum of Senator Lack, NY Legis Ann, 1985, pp. 55-57). Statutes should not be construed retroactively in the absence of a clear expression of legislative purpose (see, McKinney's Cons Laws of NY, Book 1, Statutes { 51, p. 89}). Here, there is no expression of legislative intent that the provisions of section 42 regarding refunds and credits apply retroactively. When read in context, those provisions tucked away in the effective date clause clearly relate to the transition from the former system of tax collection to the new system as described above.

The second issue in this case is whether Chapters 454 and 469 of the Laws of 1982 are unconstitutional on their face in that they deny petitioner its constitutional right to equal protection under the law. The jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass such 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 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 the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed; and

3. The petition of Fourth Day Enterprises, Inc. is denied and the Division of Taxation's denial of petitioner's refund application is sustained.

Dated: Albany, New York
October 27, 1988

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

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