

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STEVEN M. VALVO	:	DECISION
D/B/A VALVO TRANSPORT	:	
for Revision of a Determination or for Refund	:	
of Motor Fuel Tax under Article 12-A of the	:	
Tax Law for the Period November 1, 1982 through	:	
February 28, 1987	:	

Petitioner Steven M. Valvo d/b/a Valvo Transport, Routes 5 and 20, Silver Creek, New York 14136 filed an exception to the determination of the Administrative Law Judge issued on October 18, 1990 with respect to his petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period November 1, 1982 through February 28, 1987 (File No. 806546). Petitioner appeared by Timothy J. Toohey, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Neither petitioner nor the Division of Taxation filed a brief. Petitioner's request for oral argument was denied.

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

ISSUES

- I. Whether the Division of Taxation properly determined diesel motor fuel tax due.
- II. Whether petitioner has shown reasonable cause and an absence of willful neglect for abatement of penalties imposed herein.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On November 13, 1987, following an audit, the Division of Taxation issued to petitioner, Steven M. Valvo d/b/a Valvo Transport, a Notice of Determination of Tax Due under Article 12-A of the Tax Law which assessed \$33,748.90 in tax due, plus penalty and interest, for the period November 1, 1982 through February 28, 1987.

Petitioner, Steven Valvo, is the sole proprietor of Valvo Transport, a trucking business engaged in hauling general commodities. During the early part of the audit period, petitioner had two or three tractor-trailer trucks on the road. Later, in or about November 1984, petitioner registered an additional 13 trucks. During the period August 1984 through October 1985, petitioner hauled pursuant to contracts with Dominion Consolidated, a Canadian trucking company, and Brown Transport, a Georgia trucking company.

On audit, the Division requested petitioner's diesel fuel purchase records. Petitioner provided very little in the way of such records and the Division then contacted two of petitioner's known suppliers of diesel fuel during the audit period. From the record, it appears that the Division learned of these two suppliers either from records which were available or through petitioner's secretary.

Upon review of the records of Lake Oil Corp. and Superior Lubricants, Inc., the two suppliers, the Division determined that petitioner had purchased 10,577 gallons of diesel fuel from Lake Oil Corp. during the period November 1982 through July 1984, and 166,279 gallons of diesel fuel from Superior Lubricants, Inc. during the period November 1985 through February 1987. Petitioner made the aforementioned purchases in bulk and therefore did not pay diesel fuel taxes to these suppliers. Petitioner consumed the diesel fuel so purchased in the course of his trucking operations. Based upon the foregoing, the Division assessed diesel fuel tax of ten cents per gallon on petitioner's diesel fuel purchases of 10,577 gallons during the

period November 1982 through July 1984 and 166,279 gallons during the period November 1985 through February 1987. Petitioner conceded this portion of the assessment.

The Division had no supplier information for the period August 1984 through October 1985. The Division therefore estimated petitioner's diesel fuel purchases for this period. Using the purchase information obtained from Superior Lubricants, Inc., the Division determined that petitioner purchased 128,502 gallons of diesel fuel during 1986, or an average of 10,709 gallons per month during that year. This average gallons purchased per month figure was then applied to the 15 months comprising the period August 1984 through October 1985. The Division thus estimated that petitioner made bulk purchases of 160,635 gallons of diesel fuel during the period August 1984 through October 1985 and assessed diesel motor fuel tax of ten cents per gallon purchased accordingly.

The Division did not make any independent efforts to determine the identity of petitioner's supplier or suppliers of diesel fuel during the period of the estimate.

Petitioner was not registered as a supplier of diesel fuel under Article 12-A of the Tax Law during the audit period and filed no tax returns under Article 12-A during that time.

During the period August 1984 through October 1985, petitioner did purchase some amount of diesel fuel at retail. Except for three receipts totalling 106.4 gallons purchased in September 1985, petitioner produced no records of any retail purchases of diesel fuel during the August 1984 through October 1985 period.

At some point during the audit period, petitioner's bulk storage capacity for diesel motor fuel increased from a capacity of about 1,000 gallons to a capacity of about 10,000 gallons.

Petitioner's highway use tax returns filed for the period August 1984 through July 1985 indicated that petitioner's vehicles travelled 653,632 New York miles during that period. Using the Division's estimate of 10,709 gallons of diesel fuel purchased per month, or 128,508 gallons over 12 months, results in a miles per gallon figure for petitioner's vehicles of 5.09 MPG for this 12-month period.

OPINION

In his determination below, the Administrative Law Judge sustained the audit conducted by the Division of Taxation (hereinafter the "Division"). He concluded that petitioner was a distributor of diesel motor fuel during the period in issue and that petitioner failed to register as such a distributor and also failed to file diesel motor fuel tax returns during that period. Therefore, the Administrative Law Judge concluded that the Division was authorized pursuant to Tax Law § 288(2) to determine diesel motor fuel tax due from petitioner under Article 12-A. Moreover, the Administrative Law Judge noted that given petitioner's failure to maintain records of his diesel motor fuel purchases as required under Article 12-A, the Division's resort to an estimate of petitioner's fuel tax liability was proper. Secondly, the Administrative Law Judge sustained the penalties imposed upon petitioner since petitioner did not sustain his burden to show that his failure to pay tax was due to reasonable cause and not willful neglect.

On exception, petitioner reasserts the same arguments made at the hearing below.

We sustain the determination of the Administrative Law Judge. The Administrative Law Judge adequately dealt with the issues in his determination and, therefore, we uphold the determination based on his opinion rendered below.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Steven M. Valvo d/b/a Valvo Transport is denied;
2. The determination of the Administrative Law Judge is sustained in full;
3. The petition of Steven M. Valvo d/b/a Valvo Transport is in all respects denied; and

4. The Notice of Determination dated November 13, 1987 is sustained.

DATED: Troy, New York
July 3, 1991

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner