STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MERIT OIL CORPORATION	:	DECISION DTA No. 809049
for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period March 1, 1986 through December 31, 1987.	:	
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Petitioner Merit Oil Corporation, 551 West Lancaster Avenue, Haverford, Pennsylvania 19041, filed an exception to the determination of the Administrative Law Judge issued on January 28, 1993. Petitioner appeared by Hutton and Solomon, Esqs. (Stephen L. Solomon, Roy F. Hutton and Stephen Bercovitch, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was heard on September 13, 1993 which began the six-month time period for issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether petitioner is entitled to a refund of taxes paid on gasoline it sold in New York City as "leaded" gasoline subject to a one cent per gallon tax by the City of New York because said taxes were paid in error.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "4," "5," "8" and "10" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner in this case is Merit Oil Corporation ("Merit").

In the early 1980's, retail service stations in the United States provided a variety of types of gasoline, including a premium leaded fuel, a regular leaded fuel and a regular unleaded fuel. Regular unleaded was fuel with an octane level of 86-87 octane, and premium referred to a higher octane level. After a time, premium leaded fuel was eliminated and stationsbegan selling only regular leaded, premium unleaded and regular unleaded. The trend was away from leaded fuel, and by 1986 very few stations still carried leaded fuel.

On January 1, 1986, the Federal standards for leaded fuel changed, so as to allow only a maximum of one tenth (0.10) of a gram of lead per gallon. "Leaded gasoline" was defined as containing lead in the range of 0.05 grams of lead per gallon to 0.10 grams of lead per gallon. In order to qualify as unleaded gasoline under these Federal regulations, the gasoline had to contain less than 0.05 grams per gallon.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> The New York City one-cent tax applies to gasoline with 0.50 grams of lead per gallon. During the period in issue (March 1, 1986 through December 31, 1987), there could not have been any stations selling gas subject to the one-cent tax, since gasoline with 0.50 grams of lead would violate Federal standards. No company affiliated with the New York State Petroleum Council or the American Petroleum Institute was selling gas containing more than 0.10 grams, the then Federal limit. Yet, some of these companies were indeed selling gasoline denominated "leaded", pursuant to Federal regulation; signs posted at these stations referred to the gasoline with up to 0.10 grams of lead per gallon as leaded. However, other companies not affiliated with the New York State Petroleum Council or the American Petroleum Institute were not informed of the change and continued, like petitioner, to market "leaded" gasoline and pay the tax even though the gasoline they were selling had a lead content of between 0.05 and 0.10 grams and was not subject to the tax. The identity of these companies was not divulged in the record.[1]

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[1] We added the dates involved in the assessment to the Administrative Law Judge's finding of fact "4" to clarify this fact. We added the words "and pay the tax" and "was not subject to the tax" to the second to last sentence of the paragraph to clarify this fact.

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

> During the period in issue, petitioner sold leaded regular fuel, unleaded premium fuel and unleaded regular fuel. These appellations were governed by Federal standards. The Division conceded that these appellations
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> were in no way related to the New York City tax and that, in fact, there were no taxable sales.[2]

Petitioner set its prices as follows. Each gasoline station manager went out two days a week to ascertain competitors' prices for a two-mile radius. This information was communicated by facsimile transmission to Mr. Pate, Senior Vice President of Marketing, who analyzed it and set prices appropriately based on the competitors' prices. Additionally, any time managers saw a competitor reducing or raising its price, they telephoned Mr. Pate. Certain competitors' prices were given more weight than others; price adjustments were made accordingly. All prices were set by Mr. Pate.

Petitioner's prices were not always set at a level to make a profit; rather, the concept of protecting market share was given great weight. Prices were therefore set based on those of the competition.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> Mr. Pate was aware of the one-cent tax the City of New York imposed on leaded fuel in 1986 and 1987. He stated that he did not take the tax into consideration when he set prices and did not pass the tax on to customers. Mr. Pate indicated that he did not know that Merit was

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[2] We added the third sentence to the Administrative Law Judge's finding of fact "5" to more fully reflect the record. At hearing, the Division's auditor testified as follows:

"Q. So if they were selling things that were under .5, there were no taxable sales?

"A. If they were selling things under .5, and our interpretation is that it was advertised in that manner, then there would have been no problem.

"Q. But, of course, if they're advertising gas from .05 to .1, they have to have call it leaded under the federal standard. It was leaded under the federal standard, but not according to the New York City standard?

"A. If that is what federal law says. I assume that you are right" (Hearing Tr., pp. 13-14).

paying a tax it was not supposed to pay and that no one else was paying the tax. He indicated that, in his view, taxes were a concern of Merit's tax department, not his department, i.e., marketing. His goal was to beat the competitor's price. When asked if the competitor's price was "a price that presumably didn't include the one-cent tax," Mr. Pate offered no direct response. He did indicate that during the period at issue he "couldn't

understand how all of our competitors were getting more competitive in the field and we were trying to stay competitive, and all of a sudden they were doing something that I just thought was part of the market" (Hearing Tr., p. 33). Mr. Pate stated that he was not informed by anyone in the corporation that it had ceased paying the one-cent tax in 1988. Mr. Pate stated that petitioner paid its taxes from revenues generated from the sale of its product.[3]

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[3] We modified finding of fact "8" of the Administrative Law Judge's determination to more accurately reflect Mr. Pate's testimony concerning his knowledge of whether Merit's competitors' prices included the tax.

"Q. So the price that you were trying to beat was a price that presumably didn't include the one cent tax?

"A. (No response.)

"Q. In retrospect, as you look back on it, since you now know that the tax was not due during that period?

"A. I know during that period of time it was very frustrating to me. I couldn't understand how all of our competitors were getting more competitive in the field and we were trying to stay competitive, and all of a sudden they were doing something that I just thought was part of the market.

"Q. But you still beat their price?

"A. I still beat the master price, yes" (Hearing Tr., pp. 33-34).

We also modified this finding of fact to more fully reflect Mr. Pate's testimony on cross examination with respect to funds from which Merit paid its taxes. He testified as follows:

"Q. And the money to pay those taxes would have come from the money received from the sale of gasoline?

"A. No, sometimes out of Merit Oil's profit. If we weren't making a profit, Merit Oil suffered, and sometimes Merit Oil suffered because we were not making a profit on gallons of gasoline and Merit Oil has to pay.

"Q. But ultimately, wouldn't the money for the taxes come from the sale of the gasoline product?

"A. Well, that's the way we make our profits, from selling gasoline" (Hearing Tr., p. 35).

During 1986 and 1987, Mr. Paul Serpentine was the fuels accounting manager for petitioner, and New York State fuel tax returns were prepared under his supervision. He relied on invoices from suppliers, which identified fuels as leaded regular, unleaded premium and unleaded regular, but contained no further information with respect to precise lead content. If fuel was listed as "leaded" in the invoice, Mr. Serpentine assumed, incorrectly, that it was "leaded" for purposes of the New York one-cent tax.

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

> In January 1988, Mr. Serpentine learned that the one-cent tax was not due and stopped paying the tax. He stated that he calculated tax due by the category of gasoline on invoices. If the invoice stated "leaded" gas, he paid the one-cent tax without regard for lead content.
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> After petitioner ceased paying the tax, the price at which the product was selling did not change.
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> Mr. Serpentine stated that petitioner paid its taxes from revenues generated by the sale of its product.[4]

During the period in issue, 1986 and 1987, signs at each gasoline pump in all Merit stations within the City of New York indicated the total retail price per gallon of the given grade of gasoline, along with a statement that

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[4] We modified finding of fact "10" of the Administrative Law Judge's determination by adding the last paragraph. On cross examination, Mr. Serpentine testified as follows:

"Q. When these taxes were paid, the source of the monies remitted to the Tax Department were from sales of the gasoline product, was it not?

"A. Actually, we took them off the invoices that were -- that we imported into New York City, and they were described on the invoices from our various suppliers as leaded regular gasoline or unleaded regular gasoline or unleaded premium.

"Q. And that is where you arrived at the gallonage that you felt you to pay tax?

"A. Right, whatever was invoiced as leaded regular gasoline.

"Q. And the monies generated by the sales of these gasolines gave Merit Oil the money that ultimately went to pay the one cent tax?

"A. I would assume so, yes" (Hearing Tr., pp. 40-41).

all applicable taxes were included. An example of such a sign read as follows: "$1.10 all taxes included."

By letter dated May 9, 1988, petitioner requested a refund of the one-cent tax paid on sales of gasoline posted as "leaded" but containing a lead content less than that specified by the City of New York for "leaded" gasoline. The request specified a refund due of $56,851.73 for the months of March, April, May and June 1986.

By letter dated June 29, 1988, petitioner requested a refund of the one-cent tax for the months of July, August and September 1986 in the sum of $39,902.20.

Finally, by letter dated August 23, 1988, petitioner requested a refund of the one-cent tax for the months of October 1986 through December 1987 in the sum of $161,359.10.

The three requests totalled $258,113.03, the same amount set forth by petitioner in its petition.

By letter dated January 10, 1989, the Division denied those refund applications. The denial stated, in pertinent part, as follows:

> "Your request for a refund of the New York City Motor Fuel tax on leaded gasoline (.01¢ a gallon) for the period March 1986 thru December 1987, has been denied.
>
> "Field Audit of your records by our New York District Office has concluded that the fuel in question was 'posted' as leaded and therefore the .01¢ a gallon was passed on to the consumer. If a refund was to be paid it would therefore be to the consumer, not your company."

We find, as an additional finding of fact, that:

> The Division had no evidence that petitioner passed on the tax to the customer at the pump.[5]

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[5] The following is testimony given by Michael Esposito (Tax Auditor II) in reply to questions by Paul Frankel (attorney for petitioner):

"Q. And the gallonage was checked, the amount of tax checked that is in dispute. Did you ever see any factual evidence as to whether or not the tax was actually passed on to the customer at the pump?

"A. We didn't see any records.

"Q. You didn't see anything?

OPINION

Tax Law § 284(1) imposes, generally: "an excise tax on each gallon of motor fuel imported into or caused to be imported into the state by a distributor."

Tax Law § 289-c(1) provides that the tax, though payable by the distributor, shall be borne by the purchaser and when paid by the distributor shall be deemed to have been so paid for the account of the purchaser. Further, the section provides that "it shall be presumed that the price paid by the purchaser includes the tax."

Tax Law § 289-c(6) provides, in relevant part, that:

> "[w]here motor fuel, upon which the tax imposed by this article has been paid, is sold, under such circumstances that, if the tax had not been paid, the sale would not have been taxable under this article, the tax may be refunded. Refunds shall be made only as authorized by the [Division] under such rules and regulations as it may prescribe . . . ."

The Division's regulations mirror the statutory language and make it clear that the refund applicant can be the distributor (20 NYCRR 415.2[b][1] and [2]) as well as a purchaser (see, e.g., Tax Law § 415.2[a][1]).

The Division's regulations also provide that: "[e]very claim [for refund] must also establish that the motor fuel tax has been borne by the claimant and that such tax is refundable or reimbursable as described in this Part" (20 NYCRR 415.4[b][2], emphasis added).

Tax Law § 284-b authorizes the City of New York to impose a tax of one cent per gallon on leaded motor fuel.[6] The section provides further, as relevant here, that "[a] tax imposed

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"A. No.

"Q. Either way?

"A. No.

"Q. So the reason, the only reason that the Department is denying the refund claim is this statutory construction that the gas, that the price was deemed passed on?

"A. Yes" (Hearing Tr., pp. 12-13).

[6]Leaded motor fuel contains one-half gram or more of lead alkyls per gallon.

pursuant to the authority of this section shall be administered and collected by the tax commission in the same manner as the taxes imposed by this article [and that] all the provisions of this article shall apply with respect to the tax imposed . . . so far as such provisions can be made applicable . . . and such modification as may be necessary in order to adapt such language to the local tax authorized by this section" (Tax Law § 284-b).

Pursuant to the authority granted in section 284-b, the City of New York adopted a local law amending the City's administrative code to impose the tax. Specifically, section 11-2034 of the New York City Administrative Code provides:

> "[t]here is hereby imposed upon every distributor an excise tax at the rate of one cent per gallon upon motor fuel which contains one-half gram or more of tetra ethyl lead, tetra methyl lead or any other led alkyls per gallon, sold within or for sale within the city by such distributor."

The local law also amended the Administrative Code by adding a section 11-2036 entitled "Administration and collection" which mirrors the language in section 284-b and provides:

> "1. The tax imposed by this title shall be administered and collected by the tax commission in the same manner as the taxes imposed by article twelve-A of the tax law, and all the provisions of article twelve-A of the tax law shall apply with respect to the tax imposed by this subchapter so far as the provisions of said article twelve-A can be made applicable to the tax imposed by this subchapter with such limitations as set forth in said article twelve-A and such modifications as may be necessary in order to adapt the language thereof to the tax imposed by this subchapter.
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> "2. The tax commission shall make such provisions as it deems necessary for the joint administration and collection of the tax imposed by this subchapter and the taxes imposed by and authorized by article twelve-A of the tax law."

The Administrative Law Judge determined and the Division conceded at hearing that the application for refund was proper (Determination, conclusion of law "B"), but that petitioner had not shown that it bore the tax as required by the Division's regulation at 20 NYCRR 415.4(b).

Specifically, the Administrative Law Judge stated as follows:

> "Petitioner's evidence does not rebut the presumption that it was collecting tax on behalf of its purchasers. It is of no consequence that taxes were not specifically factored by the marketing department because taxes concededly were included in the prices. The prices did not fluctuate after petitioner stopped paying tax because it was pricing competitively,

> i.e., at a market rate. Further, there was no evidence that all petitioner's competitors were not collecting the tax.
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> "The evidence presented herein has not rebutted the presumption that the prices displayed on the pumps included the one-cent tax, or that the purchasers did in fact pay that one-cent tax to petitioner, correctly or not, when they paid the purchase price displayed as including all taxes.
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> "Petitioner cited a Supreme Court case, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), for the proposition that the question of whether a tax has been passed on to a customer 'entails a highly sophisticated theoretical and factual inquiry' which was not made herein. That case, however, is distinguishable because it involved a Commerce Clause violation due to discrimination against interstate commerce by the State of Florida which provided special tax rate reductions for specified products grown in Florida and used in alcoholic beverages produced there. McKesson did not qualify for the reductions and paid the higher taxes. It then sought a refund. The Supreme Court of Florida balked at authorizing the refund because it feared the petitioner would receive a windfall 'since the cost of the tax has likely been passed on to [its] customers.' The U.S. Supreme Court rejected this notion and said that the 'state could not refuse to provide a refund based on sheer speculation that a 'pass-on' occurred' (id. at 42).
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> "That was not the case herein, where it has been found that the tax was posted as included in the price and paid by purchasers of the leaded gasoline. Petitioner's argument, in hindsight, that the tax was not imposed on the 'leaded' fuel they sold misrepresents the salient facts, i.e., that they charged, collected and remitted the tax in error" (Determination, conclusion of law "C").

On this basis, the Administrative Law Judge concluded that the Division properly denied petitioner's application for refund.

At hearing, petitioner argued that there were no taxable sales under Article 12-A because the product sold did not meet the definition of "leaded fuel" that would be subject to the New York City tax, thus, section 289-c(1) is not applicable; that all of the evidence presented by petitioner establishes that the one-cent tax was absorbed by it and was never passed on to its customers; that its sale of "leaded fuel," as defined under Federal law, does not lead to the conclusion that the New York City tax was passed on to its customers; thus, the tax was paid in error and petitioner is entitled to a refund pursuant to Tax Law § 289-c(6).

On exception, petitioner additionally asserts that the tax here was not imposed under Article 12-A but under the city local law. Therefore, since the city law does not have language stating that the tax is borne by the customer, as does the State law, petitioner does not have to

show that the tax was not borne by the customer. The basis of petitioner's assertion is that the absence of the "borne by" provision in the City local law requires that the other provisions of Article 12-A which are otherwise applicable, must be modified to conform to the local law.

On exception, the Division asserts that the determination of the Administrative Law Judge is correct.

We deal first with petitioner's assertion, raised for the first time on exception, that since the local law adopted by the City of New York imposing the tax at issue did not provide that the tax is to be borne by the customer, petitioner does not have to show that the tax was not borne by the customer in order to be entitled to a refund.

We reject petitioner's assertion. The absence of the "borne by" language in the local law imposing the tax (New York City Administrative Code § 11-2034) does not overcome the specific language in section 284-b that the tax "shall be administered and collected by the [State] in the same manner as the taxes imposed by [Article 12-A]." Nor does the absence of the "borne by" language in the imposition section require "such modification as may be necessary in order to adopt [the language of Article 12-A] to the local tax." In simple terms, the local tax imposed is one cent per gallon. The local law makes clear (New York City Administrative Code § 11-2036) that the tax is to be administered and collected in the same manner as Article 12-A taxes. There is no modification to be made.[7] Thus, petitioner is required to show that, as claimant for the refund, it bore the tax.

We deal next with petitioner's assertion that since no taxable sales were made under Article 12-A, the presumption in section 289-c(1) that the price included the tax was not applicable. We reject petitioner's assertion, based on our reading of Tax Law § 289-c(6), i.e., "if the tax had not been paid [by petitioner], the sale would not have been taxable under this article, the tax may be refunded . . . under such rules and regulations as [the Division] may prescribe" (Tax Law § 289-c[6]). In short, petitioner's payment of the tax, even though

[7]We would point out that the local law mirrors the pattern of the imposition section of the State law, Tax Law § 284, which does not contain the "borne by" language.

erroneous, makes petitioner's request for refund subject to the provisions of Article 12-A and the Division's regulations. Accordingly, the burden is on petitioner to overcome the presumption in section 289-c(1) that the price of the product included the tax.

We deal next with the question of whether petitioner has shown that it did not pass on the tax to its customers, i.e., that the tax was borne by petitioner.

We reverse the determination of the Administrative Law Judge.

This case is one of first impression for this Tribunal. In the absence of State case law on point, we look to Federal law for guidance as to how petitioner may prove that it bore the cost of an excise tax. Specifically, we refer to Internal Revenue Code § 6416, which provides, in relevant part, that:

> "(a) CONDITION TO ALLOWANCE. --
> "(1) GENERAL RULE. -- No credit or refund of any overpayment of tax imposed by chapter 31 (relating to retail excise taxes), or chapter 32 (manufacturers taxes) shall be allowed or made unless the person who paid the tax establishes, under regulations prescribed by the Secretary, that he --
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> "(A) has not included the tax in the price of the article with respect to which it was imposed and has not collected the amount of the tax from the person who purchased such article" (IRC § 6416[a][1][A]).

The Federal courts have held that a taxpayer's method of setting prices directly affects the nature of the proof necessary to establish that those prices lacked an excise tax component (Tenneco, Inc. v. United States, 17 Ct Cl 345, 89-2 USTC ¶ 16,471, affd 899 F2d 1227). When a taxpayer uses competitive market pricing, as opposed to cost-based pricing, the role of the court is to ascertain if the market prices include an excise tax component.[8] The mere fact that a taxpayer's prices were market determined does not prove that the tax was not passed on; a market determined price could contain an excise tax component (GorDag Indus. v. United States, 63-2 USTC ¶ 15,532 [DC Minn]). Thus, a taxpayer who sets prices competitively must present evidence to answer the central question: "Does the market price contain an excise tax

[8]"Under cost-based pricing, a manufacturer computes each element of the cost of producing the product. To these separate elements -- labor, raw materials, depreciation, taxes, and so forth -- the manufacturer adds an appropriate profit margin. The total of the costs and the profit margin is the price" (Tenneco, Inc. v. United States, supra).

component?" (Riviera Mfg. Co. v. United States, 307 F Supp 916, 69-2 USTC ¶ 15,917, affd 440 F2d 780, 71-1 USTC ¶ 15,983).

The courts have weighed a variety of factors to help answer this question, including evidence indicating that the price set was unrelated to

the tax or determined by other factors; the correlation between price changes and application of the tax; the method of computing the tax; and the reference to taxes in the invoices or sales literature (see, Anderson Co. v. United States, 69-2 USTC ¶ 15,902 [DC Ind], affd 447 F2d 41, 71-2 USTC ¶ 16,004; Tenneco, Inc. v. United States, supra).

An examination of the Federal cases shows that no single criterion is controlling. "All of the factors . . . must be weighed against the circumstances of the case to reach a proper determination" (Anderson Co. v. United States, supra, at 86,209).

Applying these factors to the present case, we determine that petitioner has shown that it did not pass on the tax to its customers. First, there is no doubt from the record that petitioner set its prices based on the prices of its competitors, i.e., by competitive market pricing. Specifically, petitioner's managers, twice weekly, surveyed the prices of its competitors for a two-mile radius. This information was communicated by facsimile transmission to petitioner's Vice President of Marketing, who analyzed it and set prices appropriately based on the competitor's prices. Petitioner's "market price strategy" for setting prices eschewed any consideration of the tax. Petitioner's prices were not always set at a level to make a profit; rather, the concept of protecting market share was given great weight. Prices were, therefore, set based on those of the competition.

Second, it may reasonably be inferred from the record that the competitor's market prices did not include the City tax. Petitioner's expert witness testified that while some confusion may have existed in the industry, none of the companies affiliated with the New York State Petroleum Council or the American Petroleum Institute were selling gasoline subject to the tax. To his knowledge, "our companies stopped paying the tax in 1986."

Third, petitioner calculated the amount of tax to be paid by the category of gasoline on its purchase invoice.

Fourth, after petitioner ceased paying the tax, the price at which the product was selling did not change.

Fifth, the denial of the refund was based on the fact that petitioner posted the sale of leaded gas. As the record shows, petitioner was required by Federal regulations to post the gas as leaded. However, compliance with the Federal regulations, standing by itself as it does in this case, does not provide sufficient basis to conclude that the tax was being passed on to purchasers since in order to be subject to the tax, the gasoline would have to be sold in violation of the Federal regulations on lead content.

Sixth, the fact that petitioner indicated on its pumps "all taxes included" cannot reasonably be interpreted to include a tax which both parties agree could not have been imposed on petitioner's product.

Finally, the fact that petitioner paid taxes from revenues from the sale of its product cannot, in any way, be reasonably construed as evidence that the tax was "borne by the purchaser" within the meaning of the statute. This construction of the phrase "borne by the purchaser" would preclude any distributor from ever being able to make an application for refund of taxes paid in error (see, B & M Co. v. United States, 452 F2d 986, 71-2 USTC ¶ 16,024). As the Circuit Court of Appeals in B & M stated:

> "[w]e disagree with the Trial Court's inference for its import is that any taxpayer conducting a profitable business is deemed to have passed on the economic burden of the excise tax to its customers. If this were so, the statute providing for refunds for overpayment of excise taxes could be successfully invoked only by taxpayers suffering a loss in such business. Such an interpretation of the statute unreasonably extends its provisions by implication. The statute requires of a taxpayer seeking a refund only that he establish 'that he has not included the tax in the price of the article with respect to which it was imposed and has not collected the amount of the tax from the person who purchased such article' [cite omitted]" (B & M Co. v. United States, supra, 71-2 USTC ¶ 16,024, at 88,104).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Merit Oil Corporation is granted;

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

3. The petition of Merit Oil Corporation is granted; and

4. The Division of Taxation's denial of petitioner's three refund applications dated May 9, 1988, June 29, 1988 and August 23, 1988 is reversed.

DATED: Troy, New York
March 10, 1994

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

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