

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WIZARD PETROLEUM, INC.	:	DECISION
	:	DTA No. 809923
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 1, 1986 through November 30, 1987.	:	

Petitioner Wizard Petroleum, Inc., 52-00 Second Street, Long Island City, New York 11101, filed an exception to the determination of the Administrative Law Judge issued on April 22, 1993. Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh and John E. Matthews, Esqs., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner's reply brief was filed on August 17, 1993 which began the six-month period for issuance of this decision. On September 7, 1993, approximately three weeks later, the time for issuance of this decision was stayed by petitioner's request to file a supplemental brief. Such brief was received on November 5, 1993 beginning the five-month and one-week time period remaining for issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the assessments of sales and use taxes were barred by the statute of limitations found at Tax Law § 1147(b).

II. Whether petitioner has established that the sales tax audit method used by the Division of Taxation was unreasonable or resulted in an incorrect assessment of sales tax.

III. Whether the Division of Taxation carried its burden of proof to show that any failure to pay sales taxes due resulted from fraud or, in the alternative, that such failure resulted from willful neglect and not from reasonable cause.

FINDINGS OF FACT

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

During all periods pertinent to this determination, petitioner, Wizard Petroleum, Inc. ("Wizard"), was registered as a motor fuel distributor under article 12-A of the Tax Law. The Division of Taxation ("Division") issued to Wizard three notices of determination and demands for payment of sales and use taxes due, each dated July 20, 1990. The first notice assessed sales tax due for the period June 1, 1986 through July 31, 1987 in the amount of \$4,204,879.96, plus fraud penalties equal to 50 percent of the tax and interest, for a total due of \$8,466,445.58. A box was checked on this notice next to the following statement: "THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW." The notice also contains the following statement:

"The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records. In addition, fraud penalties of 50 percent of the amount of the Tax plus Interest have been added pursuant to Section 1145 of the Tax Law."

The second notice of determination issued to Wizard assessed sales tax due for the period August 1, 1987 through September 30, 1987, in the amount of \$234,707.39, plus fraud penalty and interest, for a total due of \$445,644.91. The third notice assessed penalty only for the period June 1, 1986 through November 30, 1987 in the amount of \$443,958.72.¹

¹Penalties were assessed pursuant to Tax Law § 1145(a)(1)(vi) which states, in part:

"Any person required by this article to file a return, who omits from the total amount of state and local sales and compensating use taxes required to be shown on a return an amount which is in excess of twenty-five percent of the amount of such taxes required to be shown on the return shall be subject to a penalty equal to ten percent

(continued...)

The notices of determination were issued as a result of a combined motor fuel tax and sales tax field audit commenced by the Division in April 1986. At the time the audit was begun, the Division was working jointly with the Internal Revenue Service ("IRS"). On July 8, 1986, the Division's auditor, Richard Yeates and an IRS auditor, provided Wizard with a written document request, asking for copies of 1984 and 1985 motor fuel tax returns, sales invoices for 1984 and 1985 and purchase invoices for the same period and other related records. Mr. Yeates began his audit by preparing summary worksheets of information received from Wizard and analyzing that information.

Motor fuel imported by Wizard entered New York through a terminal operated by Terminelle Corporation ("Terminelle"), a Wizard affiliate. Terminelle also serviced Janus Petroleum, Inc. ("Janus") and On-Site Petroleum, Inc. ("On-Site") which are also affiliated with Wizard. Terminelle and Wizard shared offices located at 364 Maspeth Avenue, Brooklyn where the audit was conducted. Two of Wizard's corporate officers, Ashley Jarwood and Trevor Wisdom, were principals of Terminelle during all periods under discussion.

Terminal operators, like Terminelle, are required by Tax Law § 286 (see also, 20 NYCRR 418.3) to file monthly fuel inventory reports showing, among other things, the identity of the person for whom motor fuel is stored, the identity of the person transporting the fuel to and from the storage facility, and the identity of the person to whom motor fuel is released from storage. According to Mr. Yeates's handwritten log (prepared in connection with the motor fuel tax audit), he began cross-checking the monthly fuel inventory reports filed by Terminelle with Wizard's motor fuel tax returns in March 1987.

In June 1987, Mr. Yeates visited Wizard's offices where he spoke with Ashley Jarwood. According to his contact sheet, he requested copies of sales and purchase invoices and cancelled checks. The period covered by this request is not indicated. On July 7, 1987, Mr. Yeates

¹(...continued)
of the amount of such omission."

returned to Wizard's offices and notified Wizard that sales invoices were missing. The terminal operator reports filed by Terminelle showed book transfers of motor fuel from Wizard to Janus and On-Site for which no invoices were provided.² Wizard provided whatever information it had available and asked for additional time to gather the other information requested by the auditor.

Mr. Yeates's supervisor, James Hika, asked one of the Division's management units to provide him with information regarding Wizard's sales tax filing record. In response to that request, he received a computer printout generated on November 4, 1987, summarizing the Division's records regarding Wizard's filing of tax returns. The printout shows that Wizard filed returns for the months of November 1985, December 1985 and March 1986 without payment of tax shown as due on those returns. In November 1986, Wizard gave the Division's auditor two certified checks in the amounts of \$7,407.64 and \$228,690.90 as payment for tax due for the months of December 1985 and March 1986 respectively. The Division later issued an assessment for tax due for the month of November 1985 in the amount of \$122,588.24. The computer printout also showed that Wizard filed no sales tax returns after May 1986.

On November 10, 1987, Mr. Hika and Mr. Yeates met with Ms. Jarwood and requested copies of sales tax returns (forms FT-945, Sales Tax Prepayment on Motor Fuel) for the period May 1986 through September 1987, plus supporting documentation and schedules. In response to this request, Ms. Jarwood gave the Division copies of returns purportedly filed with the Division. Each of the returns shows substantial amounts of motor fuel imported into New York by Wizard, and a credit equal to the amount of the prepaid sales tax due, resulting in a zero tax liability. Ms. Jarwood told the auditors that Wizard sold all of the product it imported into New York during this period to All City Gas Sales, Inc. ("All City") for export out of New York.

²A book transfer involves the transfer of motor fuel from the books of one corporation to the books of another corporation, without any actual movement of the fuel.

Both auditors testified that Ms. Jarwood told them that Wizard had previously filed the sales tax returns provided on audit with the Division by mailing them to Holtsville, New York. The Division has no offices in Holtsville, New York. Ms. Jarwood did not testify at hearing, but in an affidavit she stated:

"I have no recollection of stating to an auditor of the New York State Department of Taxation and Finance that any tax returns of Wizard Petroleum, Inc. were sent to Holtsville, N.Y."

Ms. Jarwood provided the auditors with a copy of a "Certificate for Sales Tax Exemption on Purchase of Certain Fuels" for All City. It bears the signature of Peter Strauss and is dated May 28, 1986. Entries on the certificate indicate that it is a blanket certificate and that fuel was purchased exclusively for immediate export to New Jersey. The certificate, which bears the print date "10/83" was not authorized for use after June 1985.

The auditors compared Wizard's filed motor fuel tax returns, the sales tax returns provided on audit and Terminelle's monthly report of fuel inventory. This comparison disclosed the following information.

Wizard's motor fuel tax returns for the months of June 1986 through September 1987 show no credits taken for sales to out-of-state customers or for transfers out of state. Thus, Wizard's motor fuel returns, which show no exports of motor fuel, were found to be in complete conflict with the sales tax returns which show that all of its fuel was sold for export.

Terminelle's reports show book transfers of motor fuel to entities other than All City, including Janus, On-Site, and companies identified as "Dome", "Rack Sales, Inc.", and others. This is contrary to Wizard's claim that it sold all of the motor fuel it imported to All City. Terminelle's reports also show book transfers of motor fuel from All City to Janus and others, indicating that all fuel purchased by All City was not immediately exported. The reports also show that the motor fuel which entered the Terminelle terminal eventually was trucked out, primarily by vehicles owned by Janus.

Terminelle's reports were signed by Trevor Wisdom as vice-president. Mr. Wisdom also signed Wizard's motor fuel tax returns and some of the sales tax returns provided to the auditors.

The following information is typical of information contained in Terminelle's monthly fuel inventory report.

One report (placed in evidence) is for the month of July 1987. It is signed by Trevor Wisdom as vice president of Terminelle. Attached to the report are six individual customer reconciliations. The first reconciliation is for "ACP" (All City).³ It shows a beginning inventory of 12,621,727 gallons of motor fuel, and book transfers totalling 2,214,336 gallons of motor fuel from Wizard to All City. It then shows book transfers of 2,456,910 gallons of motor fuel from All City to "Tun-Yung". The summary of withdrawals section shows no delivery or transportation of motor fuel out of the terminal. Other reconciliations show book transfers of motor fuel from Wizard to Janus and the withdrawal and trucking of that fuel from the terminal; book transfers from Wizard to On-Site (also trucked out of the terminal). A reconciliation for Tun-Yung shows book transfers of motor fuel from All City to Tun-Yung and from Tun-Yung to Sun-Light and again no actual withdrawals of fuel from the terminal.

Based upon the facts uncovered on audit, Mr. Hika recommended that the audit results be transferred to the Division's Petroleum, Alcohol and Tobacco Bureau for possible criminal investigation. After meeting with representatives of that bureau, Mr. Hika was instructed to hold the audit in abeyance until the criminal investigation was completed. In June 1990, the auditors were instructed to proceed with the audit by assessing any tax determined to be due.

The amount of tax assessed by the Division for each month of the assessment period is the amount shown as due on each sales tax return provided to the auditors. No adjustments were made except that the credit claimed on each return was disallowed. The fraud penalty was imposed on all tax assessed. An additional penalty was imposed under Tax Law § 1147(a)(7) for

³Where the name "All City" is spelled out on the reconciliations, the customer motor fuel registration number is shown as "5199." This is the same number shown where the abbreviation "ACP" is used.

the period June 1, 1986 through September 30, 1987. Worksheets prepared by the Division and provided to petitioner show that this penalty was calculated on a monthly basis (as was the tax assessment) for the months of June 1986 through September 1987, although the notice of determination assessing the penalty indicates that the penalty was determined for the sales tax quarterly period ending November 30, 1987.

All of the sales tax returns provided to the auditors in November 1987 bear the following imprint in the upper lefthand corner "FT-945 (5/85)". Form FT-945 was revised in May 1985, June 1986 and September 1987. The returns provided to the auditors were completed on obsolete forms. According to the affidavit of James J. Morris, Jr., a Division employee whose office is in charge of revising these forms, revised forms are distributed to registered motor fuel distributors on a monthly basis.

Chapter 44 of the Laws of 1985 made significant amendments to New York's motor fuel tax law. The "First Import Act," as it came to be called, provided for the imposition of the motor fuel tax and the prepayment of sales tax at the time of importation or production, rather than at the time of sale. The Division introduced into evidence three publications of the Division which explained to motor fuel distributors their obligations under the First Import Act. Among other things these publications explain that a purchaser buying for immediate export would be required to file a properly completed Form FT-936, "Statement of Exportation of Motor Fuel by Purchaser." The publications also explain that purchases of motor fuel for immediate export do not qualify for exemption from taxation, although a refund or credit would be allowed for tax paid or passed through if certain conditions were met. The FT-936 differs from the All City sales tax exemption certificate provided by Wizard in several important respects.

The FT-936 requires attachment of a copy of the purchaser's "valid distributor/dealer license" or a letter from the state in which the dealer operates certifying his status as a distributor/dealer of motor fuel. The FT-936 requires the purchaser to identify the location of the out-of-state facility to which the fuel will be transported and to identify the mode of

transportation and the name of the transporter (if different from the purchaser). Finally, the FT-936 asks the purchaser to state the number of gallons of motor fuel purchased. The sales tax exemption certificate contains none of these requirements.

Wizard entered into evidence several documents which demonstrate that the Division's recordkeeping system contained an error with regard to Wizard's sales tax payment record.

Mr. Yeates received a certified check from Wizard in the amount of \$228,690.90 as payment for sales tax due for the period ended March 31, 1986. In a letter to Wizard's attorney, Norman Berkowitz, dated March 16, 1990, the Division correctly advised that no sales tax was due for that period, but also advised that penalty and interest totalling \$126,269.62 remained due. The Division issued to Wizard a Notice and Demand dated June 1, 1992, requesting payment of penalty and interest in connection with the late payment of tax for the period ended March 31, 1986. By this time, the penalty and interest amounted to \$145,155.15. There is no proven error in these documents; however, attached to the Notice and Demand is a Consolidated Statement of Tax Liabilities which asserts that the tax assessment for the period ended March 31, 1986 in the amount of \$228,690.90 was not paid and is subject to collection action by the State.

Wizard also entered in evidence a letter signed by Joseph M. Fiano as Director of the Division's Tax Compliance Division which states, in pertinent part:

"Your client's return for the period ending November 30, 1985 was received timely on December 20, 1985, without payment. Due to a systems problem, our Processing Division was unable to issue an assessment for this unpaid tax until February 27, 1989, however, your client could have made voluntary payment at any time. We have no record that any payments were received for this period. The balance now due is \$229,412.30 which consists of \$122,588.24 in tax, \$36,776.42 in penalty and \$70,047.64 in interest."

Petitioner's purpose in introducing this letter is to show that the Division's computer system is flawed and, as a consequence, that the Division's assertion that no sales tax returns were filed for periods after May 31, 1986 is unreliable.

Benet Doloboff, Wizard's accountant during the periods at issue, testified concerning accounting work done by him or his staff for Wizard. He stated that he or a member of his firm prepared Wizard's monthly motor fuel tax returns and sales tax prepayment returns at the same time. The completed returns were given to Wizard's bookkeeper with instructions for payment of the tax shown as due on the returns. The returns were prepared from information provided by Wizard. Mr. Doloboff did not maintain Wizard's books and records but relied on the records provided. He testified that, to the best of his knowledge, all returns he prepared were filed.

When Mr. Doloboff was asked the basis for his belief that All City was exporting motor fuel he stated: "I had a resale certificate." He admitted under cross-examination that book transfers of motor fuel do not constitute an export of fuel and also admitted he had no personal knowledge as to whether All City actually exported motor fuel.

Mr. Doloboff was asked to explain why Wizard claimed no credit for out-of-state sales on its motor fuel tax returns for the subject period, but claims that all of its purchases were sold for export for sales tax purposes. He responded as follows:

"We had in our possession this export resale certificate for export, and were never given any sort of resale certificate for excise taxes. Since we had no certificate in our files, we -- and the taxpayer said they were going to try and get that, we felt that it was prudent that they file the excise tax return, and if and when we were able to receive a certificate of exemption we could always file for a refund." (Tr., pp. 294-295.)

All City provided Wizard with a Federal Registration for Tax-Free Transactions Under Chapters 31 and 32 of the Internal Revenue Code, dated May 5, 1986.

The Division had in its audit files a copy of a New York State Export Certificate for article 13-A petroleum business taxes. It is a blanket certificate, showing All City as the buyer and Wizard as the seller of petroleum purchased for immediate export for use outside New York. Apparently, it was received from Wizard during the audit.

The Division offered in evidence a sample invoice showing a sale by Wizard of 167,412 gallons of gasoline to All City for \$120,536.64, plus an 8% State "gross receipts tax" of

\$3,463.30, for a total due of \$123,999.94. Mr. Doloboff testified that the invoice is typical of those issued by Wizard to All City. He also testified that he used Wizard's sales invoices to prepare its motor fuel and sales tax returns. Mr. Doloboff testified that Wizard maintained adequate books and records for the audit period.

OPINION

The Administrative Law Judge found that petitioner did not prove the fact and date of mailing of the sales tax returns in order to show the date on which the limitation period commenced. The Administrative Law Judge further concluded that Mr. Doloboff's testimony regarding preparation of monthly sales tax returns fell short of proving that the returns were ever mailed to or filed with the Division.

The Administrative Law Judge rejected petitioner's claim that the tax was estimated stating that this claim was not supported by the record. The Administrative Law Judge stated that "[t]he amount of tax assessed . . . was based entirely on petitioner's own calculation of sales tax prepayments due on its import of motor fuel. The Division's only adjustment was to disallow the credit claimed on each return for purported sales for immediate export" (Determination, conclusion of law "D").

The Administrative Law Judge further found that the record does not support petitioner's claim that the Division failed to make an adequate request for its books and records. The Administrative Law Judge stated that "Mr. Yeates testified that he requested books and records for the entire assessment period, and petitioner presented no evidence to challenge that testimony" (Determination, conclusion of law "D").

In addition, the Administrative Law Judge concluded that: "[a] credit is a form of exemption from tax, and the taxpayer bears the burden of showing 'a clear cut entitlement to the statutory benefit' (Matter of Golub Service Station v. Tax Appeals Tribunal, 181 AD2d 216, 585 NYS2d 864, 865, quoting Matter of Luther Forest Corp. v. McGuinness, 164 AD2d 629, 632, 565 NYS2d 570)" (Determination, conclusion of law "D"). The Administrative Law Judge found no

authority requiring the Division to "conduct a full and complete audit in every instance" and prohibiting the Division "from limiting its audit by merely requesting evidence to establish a taxpayer's entitlement to claimed credits" (Determination, conclusion of law "D").

The Administrative Law Judge determined that petitioner was not entitled to any of the credits claimed. The Administrative Law Judge stated that the exemption certificate provided by petitioner was not the correct form. If petitioner wanted to make sales for immediate export without passing through the prepaid sales tax, it should have obtained a Statement of Exportation of Motor Fuel by Purchaser (FT-936). Also, the exemption certificate provided by petitioner did not contain all the information required by a Statement of Exportation of Motor Fuel by Purchaser. The Administrative Law Judge rejected petitioner's claim that it accepted the exemption certificate from All City in good faith because the monthly reports of Terminelle show book transfers to entities other than All City.

Finally, the Administrative Law Judge found clear and convincing evidence to support a finding of fraud. Ms. Jarwood's representation that all of Wizard's sales were to All City is unsupported by the record as is the statement that All City immediately exported its purchases from Wizard. The Administrative Law Judge concluded that because of Ms. Jarwood's and Mr. Wisdom's day-to-day involvement with both Wizard and Terminelle, they must have been aware that all of Wizard's sales were not made to All City and that All City did not immediately export all the motor fuel it purchased.

On exception, petitioner continues to argue that assessment of sales and use taxes for the audit period is barred by the statute of limitations. Petitioner argues that Mr. Doloboff's timely preparation of the returns and the fact that copies of the returns were readily available to the auditor outweigh the Division's computer printout which showed that no returns were filed after May 1986. Petitioner asserts that any reliance on the computer printout is misplaced as the Division's system had a "systems problem" during this period.

Petitioner further argues that no written request was made for its books and records and there is no entry in the auditor's tax field audit record showing an oral request for records. Petitioner asserts that its books and records were adequate and a complete audit could have been performed.

Petitioner also continues to argue that it accepted the exemption certificate from All City in good faith and is relieved of its duty to collect the sales tax. Petitioner also asserts that if the exemption certificate was deficient, petitioner was denied its right to correct the deficiency.

Finally, petitioner argues that the Division has failed to meet its burden of proof with respect to the fraud penalty. Petitioner questions how the Division could make a determination that there was fraud when so little time was spent by the auditor on this matter after he received the tax returns on November 10, 1987.

In response, the Division argues that the Administrative Law Judge properly held that the assessments were timely issued. The Division states that the Administrative Law Judge was correct in giving little weight to Mr. Doloboff's testimony regarding the preparation of the returns and their possible mailing. With regard to the prompt production of copies of the returns, the Division states: "the returns were provided only after repeated requests. . . . In any event, mere production of copies of documents has little bearing on the issue of whether or when the original documents might have been mailed" (Division's brief, p. 7).

The Division further argues that the Administrative Law Judge correctly determined that the audit was in all respects proper. The Division agrees with the Administrative Law Judge's conclusion that the burden was on petitioner to demonstrate its entitlement to the exemption and the Division was not the party required to request documents or search for documents to uphold the exemption. With respect to petitioner's argument that it had adequate books and records for a complete audit, the Division argues that the Administrative Law Judge made a finding that "petitioner had provided all records available, and that certain necessary invoices were missing" (Division's brief, p. 8).

Finally, the Division argues that the Administrative Law Judge correctly held that the Division met its burden of proving fraud on the part of petitioner. The Division asserts that petitioner falsely claimed entitlement to a credit for motor fuel sold for immediate export when petitioner knew that no such motor fuel was exported.

In its reply brief, petitioner repeats its arguments that: (1) the period permitted to assess additional taxes expired; (2) the Division did not meet its burden to prove fraud; (3) petitioner's books and records were sufficient to enable a complete audit to be performed and (4) petitioner accepted the exemption certificate in good faith and, therefore, was relieved of its duty to collect sales tax from its customer.

In its supplemental statement, petitioner repeats the arguments made in its exception, brief in support and reply brief.

On exception, petitioner has raised the same arguments made before the Administrative Law Judge. Since the Administrative Law Judge adequately addressed these arguments, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

4. The notices of determination issued on July 20, 1990 are sustained.

DATED: Troy, New York
March 24, 1994

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

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