

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

| | | |
|-------------------------------------|---|-----------------|
| In the Matter of the Petitions | : | |
| of | : | |
| ED MIR SERVICE STATION, INC. | : | DECISION |
| AND EDDIE DAVID | : | DTA NOS. 819515 |
| | : | AND 819516 |

for Revision of Determinations or for Refund of Sales and
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 1997 through May 31, 2000.

Petitioners Ed Mir Service Station, Inc. and Eddie David, 92 Thunder Road, Holbrook, New York 11741, filed an exception to the determination of the Administrative Law Judge issued on June 23, 2005. Petitioners appeared by Lloyd W. Winfield, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Nicholas A. Behuniak, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Petitioners' request for oral argument was denied.

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

ISSUE

Whether the Division of Taxation properly determined that petitioners, Ed Mir Service Station, Inc. and Eddie David, calculated greater prepaid tax credits than allowed by law on Ed Mir Service Station, Inc.'s sales and use tax returns reporting sales of motor fuel by the company.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact “2” and “3” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

Petitioner Ed Mir Service Station, Inc. operated an Exxon gas station (“the station”) and small convenience store in Bohemia, Suffolk County, New York, during the period in issue. The service station had both full-service and self-service gasoline pumps, an automotive repair business and a small convenience store. Petitioner Eddie David was the president and sole shareholder of the station. The business was sold in May 2000.

We modify finding of fact “2” of the Administrative Law Judge’s determination to read as follows:

In September 2000, the Division of Taxation’s (“Division”) Brooklyn district office commenced a sales tax field audit of the station by sending an audit appointment letter and written request for the station’s records. Petitioners failed to provide the Division with a complete set of verifiable books and records after several requests. Included within the records not provided were cash register tapes, sales journals, daily shift reports and sales receipts. As a result, the Division estimated the station’s sales tax liability, which included, as a component an amount for excessive tax credits allegedly taken by the station.¹

We modify finding of fact “3” of the Administrative Law Judge’s determination to read as follows:

The Division issued a Notice of Determination (No. L-020384038-9) to Ed Mir Service Station, Inc. dated December 31, 2001 assessing additional sales and use taxes of \$33,715.83, plus penalties and interest, for a total of \$56,311.39.

The Division issued a Notice of Determination (No.

¹We modified finding of fact “2” to more accurately reflect the record.

L-020435651-4) to Eddie David dated January 7, 2002 assessing additional sales and use taxes in the amount of \$33,715.83 plus penalties and interest for a total of \$56,783.49.²

After a hearing was held in this matter before the Division of Tax Appeals, petitioners submitted a substantial portion of the station's books and records, and after having had a chance to review them, the Division concluded it would not further challenge the price at which petitioners sold gasoline. Thus, the remaining issue concerns only the prepaid tax credit calculation.

As part of the audit, the Division attempted to verify the amount of prepaid tax credit taken by petitioners during the periods in issue. Based upon its estimates, the Division determined that petitioners may have utilized an incorrect amount of prepaid credit in their sales and use tax filings.

The calculation of prepaid credit available to a taxpayer is based upon utilization of the applicable published rate for the credit multiplied by the gallons of gasoline sold during a given period.

Petitioners filed forms FT-943, Quarterly Inventory Report by Retail Service Stations and Fixed Base Operators, as attachments to the station's New York State and local sales and use tax returns, forms ST-810. On forms FT-943, petitioners noted the gallons of gasoline the station purchased and the gallons sold during any one particular period. The prepaid credit is listed on Form FR, an attachment to Form ST-810.

The Division submitted the following computation of excess prepaid credits taken by petitioners during the period in issue:

²We modified finding of fact "3" to clarify the amount of the tax asserted in the notices of determination.

| A Quarter Ended | B Gallons Sold | C Published Prepaid Credit Rate | D Audited Prepaid Credit | E Reported Prepaid Credit | F Excess Prepaid Credit Taken |
|-----------------------|----------------------|------------------------------------------|-----------------------------------|------------------------------------|----------------------------------------|
| 8/31/1997 | 275,790 | 0.087 | \$23,993.73 | \$25,056.00 | \$1,062.27 |
| 11/30/1997 | 235,324 | 0.087 | 20,473.19 | 20,907.00 | 433.81 |
| 2/28/1998 | 238,159 | 0.087 | 20,719.83 | 21,089.23 | 369.40 |
| 5/31/1998 | 232,893 | 0.087 | 20,261.69 | 19,894.73 | (366.96) |
| 8/31/1998 | 202,388 | 0.079 | 15,988.65 | 16,857.84 | 869.19 |
| 11/30/1998 | 195,300 | 0.079 | 15,428.70 | 15,978.93 | 550.23 |
| 2/28/1999 | 141,982 ³ | 0.079 | 11,216.58 | 10,459.36 | (757.22) |
| 5/31/1999 | 172,586 | 0.079 | 13,634.29 | 15,245.00 | 1,610.71 |
| 8/31/1999 | 169,279 | 0.07 | 11,849.53 | 14,931.00 | 3,081.47 |
| 11/30/1999 | 198,684 | 0.07 | 13,907.88 | 16,116.08 | 2,208.20 |
| 2/29/2000 | 174,321 | 0.07 | 12,202.47 | 17,592.05 | 5,389.58 |
| 5/31/2000 | 149,598 | 0.07 | 10,471.86 | 15,952.00 | 5,480.14 |
| Total | 2,386,304 | | \$190,148.41 | \$210,079.22 | \$19,930.81 |

Petitioners were asked to provide the vendor invoices and backup calculations on the prepaid tax credits for the three randomly chosen quarters ended 5/31/98, 2/29/99 and 2/29/00. The work papers prepared by petitioner's accountant reveal that the prepaid credit for each of the periods ended 5/31/98 and 2/28/99 was calculated at \$19,894.73 and \$10,459.36, respectively, by taking a credit for the actual New York State sales tax at 7% paid to suppliers on fuel purchased during those quarters. The work papers appear to indicate that the prepaid credit for the period ended 2/29/00 was calculated by multiplying 7% times the taxable sales for the

³ This amount should read 142,982 as reported, thus decreasing the quarterly result by \$79.00, and the overall excess prepaid credit to \$19,851.81.

quarter of \$251,315.00. The actual sales tax paid on fuel purchases during that quarter was \$12,741.75, based on petitioner's documentation.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge noted that every distributor of motor fuel must pay a prepaid tax on each gallon of motor fuel which it imports or causes to be imported into New York State for use, distribution, storage or sale in the State (*see*, 20 NYCRR 561.3[a][1]). Such tax is imposed on the owner of the motor fuel being imported at the time the off-loading is commenced at or into any terminal or other facility.

As set forth in the regulation at 20 NYCRR 561.7(a):

When motor fuel is sold at retail, rather than passing through the prepaid tax to the customer, the seller must collect the State and local sales taxes based upon the actual selling price of the motor fuel less the State motor fuel tax imposed by Tax Law article 12-A and, where applicable, the New York City tax on leaded gasoline, at the state and local tax rates in effect where the taxable sale occurs. The price upon which the retail sales tax is based must not include the prepaid taxes paid on the fuel.

However, the station is permitted a refund or credit for prepaid sales taxes paid by or passed through to it (*see*, 20 NYCRR 561.9[a]). The amount of the refund or credit allowable is determined at the time the station sells each gallon of fuel (*see*, Tax Law § 1120; 20 NYCRR 561.10[a]).

The only issue remaining for resolution by the Administrative Law Judge was the proper manner of calculating the taxpayers' prepaid credit. In petitioners' case, the credit is claimed by the filing of Form FR, a Report of Sales and Use Tax on Motor Fuel and Diesel Motor Fuel, as an attachment to Form ST-810, the New York State and Local Sales and Use Tax Return Quarterly for Part-Quarterly Filers. The Administrative Law Judge observed that consistent with

the Tax Law and regulations concerning the calculation of the credit, the Form FR filing instructions indicate that one should:

Enter . . . the total amount of prepaid sales tax either paid by you or included in the price you paid to your supplier for motor fuel and diesel motor fuel **sold or used during the period** (emphasis in original).

The Administrative Law Judge also noted Form FT-943, Quarterly Inventory Report by Retail Service Stations and Fixed Base Operators, another attachment to petitioner's Form ST-810, requires the reporting of fuel by gallons sold or used during the reporting period. Thus, from petitioners' own records the Division obtained the gallons of fuel sold during the reporting period and used this amount to determine the credit to which petitioner was entitled upon the sale of such fuel, the triggering event. The Administrative Law Judge rejected petitioners' attempt to calculate the credits to which the station was entitled by totaling the prepaid sales tax remitted to the supplier during a reporting period, or by a calculation using their taxable sales, as not in accordance with the Tax Law and regulations. The Administrative Law Judge found that petitioners failed to carry their burden of proving that the Division improperly calculated that petitioners had taken excess prepaid tax credits.

Accordingly, the Division's revised assessment of excess prepaid credits due from petitioners was sustained by the Administrative Law Judge.

ARGUMENTS ON EXCEPTION

Petitioners, on exception, did not challenge any of the findings of fact of the Administrative Law Judge, but disagree generally with her conclusion that petitioners had taken excess prepaid tax credits on their motor fuel. Petitioners maintain that the prepaid sales tax

collected by the vendor was the actual cost to petitioners and should be allowed as a credit on the quarterly sales tax return, resulting in no excess credits.

The Division distills petitioners' argument to: as soon as petitioners paid any sales taxes to a distributor, they automatically took that full amount as a prepaid tax credit on their returns regardless of the actual number of gallons of fuel which were sold to retail consumers. This, the Division urges, is contrary to the applicable provisions of the Tax Law which require that prepaid tax credits be taken in the period when the motor fuel is sold. The Division argues that based on their own books, records and filed returns, petitioners miscalculated the prepaid tax credit on the station's sales and use tax returns and have taken excessive credits.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. The Administrative Law Judge has considered and properly decided each of the issues and arguments presented. Petitioners have offered no evidence below, or argument on exception, that would justify our modifying the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ed Mir Service Station, Inc. and Eddie David is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Ed Mir Service Station, Inc. and Eddie David are denied; and

4. The Notices of Determination issued to Ed Mir Service Station, Inc. and Eddie David dated December 31, 2001 and January 7, 2002, respectively, are sustained as modified,⁴ together with penalty and interest.

DATED: Troy, New York
April 6, 2006

/s/Charles H. Nesbitt

Charles H. Nesbitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner

⁴In accordance with finding of fact "8" of the Administrative Law Judge's determination, the total excess prepaid tax credit is \$19,930.81. This total was further reduced in footnote 3 herein by \$79.00 resulting in an overall excess prepaid credit of \$19,851.81.