

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HARBOR PETROLEUM CORP. :
for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the Tax :
Law for the Period July 1984. :

In the Matter of the Petition :
of :
HARBOR PETROLEUM CORP. : DETERMINATION
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 July 1984. :

In the Matter of the Petition :
of :
LAWRENCE E. SMITH :
OFFICER OF HARBOR PETROLEUM CORP. :
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 July 1984. :

Petitioner Harbor Petroleum Corp., 15 Lexington Avenue, New Haven, Connecticut 06513, filed petitions for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period July 1984 and 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 July 1984 (File Nos. 801569 and 801747).

Petitioner Lawrence E. Smith, officer of Harbor Petroleum Corp., 15 Lexington Avenue, New Haven, Connecticut 06513, filed a petition 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 July 1984 (File No. 801746).

A consolidated hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1987 at 9:15 A.M., with all briefs to be submitted by October 31, 1987. Petitioners appeared by Levine & Robinson, P.C. (Kenneth L. Robinson, Esq., of counsel). The Audit Division appeared

by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether Harbor Petroleum Corp. is liable for motor fuel tax and sales tax with respect to two bargeloads of gasoline shipped from New Jersey into New York.

FINDINGS OF FACT

1. Petitioner Harbor Petroleum Corp. ("Harbor") is a Delaware corporation authorized to do business in the State of Connecticut, with offices at 15 Lexington Avenue, New Haven, Connecticut. Since 1978, Harbor has been primarily engaged in the waste oil business in Connecticut. In April 1983, Harbor was granted a Connecticut motor fuel distributor's license and since that time has also participated in Connecticut motor fuel transactions.

Harbor has never held a New York distributor's license; however, it registered with New York as a sales tax vendor on October 21, 1981. On the registration form, Harbor indicated that it did not expect to collect sales and use taxes or to pay over such taxes to the Department of Taxation and Finance.

2. In or about June 1984, one of Harbor's customers, Fireline Petroleum Supply Distribution Company, Inc. ("Fireline") of Canton, Massachusetts, telephoned petitioner Lawrence E. Smith, president of Harbor, and informed him that Fireline needed gasoline for the upcoming Independence Day weekend. Fireline is affiliated with the Cumberland Farms chain of convenience stores and gas stations and is a registered New York State motor fuel distributor.

3. Harbor made inquiries with fuel brokers in the New York and New Jersey area in order to locate a supply of gasoline. Mr. Smith was then contacted by David Bogatin, president of Lesez Petroleum Corp. ("Lesez") of Oceanside, New York, who offered to sell gasoline.

4. Mr. Smith met with Mr. Bogatin at Lesez's terminal in Oceanside. Mr. Smith observed that the terminal had substantial storage capacity and apparently could deliver motor fuel by barge or tank truck. The terminal appeared to be quite busy.

5. Mr. Smith advised Mr. Bogatin that Harbor was not a licensed New York distributor and consequently would be required to pay all motor fuel and sales taxes to Lesez. Mr. Bogatin agreed that the selling price would include all taxes.

The First Shipment

6. Harbor entered into contracts to purchase the gasoline from Lesez and to sell it to Fireline. The terms of the contracts were set forth in telex messages, some of which are in the record.

(a) Contract between Harbor and Lesez.

(1) A telex from Lesez to Harbor dated June 26, 1984 at 15:16 Eastern Standard Time provided as follows:

"CONFIRMING OUR TELEPHONE CONVERSATION ON 6/26/84
CONCERNING PURCHASE OF 50,000 BARRELS OF PETROLEUM
PRODUCTS.

25,000 BARRELS OF REGULAR AT .89 - 934,500.00
25,000 BARRELS OF NO-LEAD AT .93 - 976,500.00
TOTAL -1,911,000.00

PAYMENT FOR THE SAID BARRELS TO BE AS FOLLOWS

HARBOR PETROLEUM SHALL PROVIDE AN IRREVOCABLE LETTER OF
CREDIT MADE OUT TO LESEZ PETROLEUM CORP.
3631 HAMPTON ROAD
OCEANSIDE, NY

TO CITIBANK
2243 JACKSON AVENUE
LONG ISLAND CITY, NY 11101
ATTENTION [sic]: ED ODOGART
ACCOUT [sic] # 154-56070

ALSO HARBOR PETROLEUM WILL PAY UPON LOADING OF BARGE A
CERTIFIED CHECK FOR THE SUM OF \$1,911,000.00 PAYABLE TO LESEZ
PETROLEUM CORP. - CHECK TO BE GIVEN TO A REPRESENTATIVE OF
LESEZ PETROLEUM CORP.

LESEZ PETROLEUM CORP WILL BE A COMMISSIONED BROKER IN THIS
TRANSACTION YOU WILL RECEIVE YOUR INVOICES FROM THE
SUPPLYING CO. DEBBI OIL CORP. STATING ALL APPLICABLE TAXES
ARE PAID."

(2) The telex message which accepted this offer is not in the record. Notations on a copy of the offering telex, however, indicate that it was accepted with the change that the funds would be paid by wire, rather than by certified check.

(b) Contract between Harbor and Fireline.

(1) A telex from Harbor to Cumberland Farms dated June 26, 1984 at 12:21 Eastern Standard Time provided as follows:

"CONFIRMING ARRANGEMENTS BETWEEN CUMBERLAND FARMS
(JACK RYAN) AND HARBOR PETROLEUM CORPORATION (LARRY
SMITH). CUMBERLAND FARMS AGREES TO PURCHASE
AND HARBOR PETROLEUM AGREES TO SELL THE HEREIN SPECIFIED
COMMODITY UNDER THE TERMS AND CONDITIONS SET FORTH AS
FOLLOWS:

COMMODITY: REGULAR LEADED GASOLINE AND UNLEADED

REGULAR GASOLINE.

QUANTITY: MAXIMUM 25,000 BARRELS OF REGULAR LEADED GASOLINE.

MAXIMUM 25,000 BARRELS OF UNLEADED REGULAR GASOLINE.

MEASUREMENTS: SELLERS BARGE LOADED QUANTITY AT LOADING DOCK.

QUALITY: GOOD COMMERCIAL GRADE - TO MEET ASTM AND NEW YORK HARBOR SPECIFICATIONS.

DESTINATION: DELIVERED AGWAY TERMINAL ALBANY, NEW YORK.

PRICE: \$.94 PER GALLON REGULAR GASOLINE PRICE INCLUDES ALL APPLICABLE NEW YORK STATE AND FEDERAL TAXES.
\$.99 PER GALLON UNLEADED REGULAR GASOLINE PRICE INCLUDES ALL APPLICABLE NEW YORK STATE AND FEDERAL TAXES.

TERMS: AN IRREVOCABLE LETTER OF CREDIT PAYABLE TO HARBOR PETROLEUM CORPORATION, 15 LEXINGTON AVENUE, NEW HAVEN, CONNECTICUT 06513 STATING FUNDS TO BE WIRED TO H.P.C. BANK ACCOUNT AT CITY TRUST, 961 MAIN STREET, BRIDGEPORT, CONN., ACCOUNT NUMBER #840-5158, ATTENTION WILLIAM BARNHARDT UPON LOADED QUANTITY BEING MEASURED BY INDEPENDANT [sic] INSPECTORS (E.W. SAYBOLT & COMPANY) PRIOR TO VESSEL LEAVING SELLERS DOCK."

(2) A telex from Fireline to Harbor dated June 26, 1984 at 16:00 Eastern Standard Time provided as follows:

"RE: SALES AGREEMENT TELEX THIS DATE

WE ARE IN AGREEMENT WITH THE CONTENTS OF THE REFERENCED SALES CONTRACT WITH THE FOLLOWING CHANGES:

- 1) THE PURCHASER SHOULD BE REGARDED AS FIRELINE PETROLEUM SUPPLY
 //////////////////////////////////////
 DISTRIBUTION CO. INC., 777 DEDHAM STREET, CANTON MA. 0202 [sic]
 //////////////////////////////////////
 RATHER THAN CUMBERLAND FARMS.
- 2) DESTINATION: DELIVERED TO AGWAY TERMINAL ALBANY, NEW

YORK
O/A JUNE 29, 1984.
////////////////

- 3) PRICE TO INCLUDE ALL APPLICABLE NEW YORK STATE, FEDERAL, AND ALBANY COUNTY SALES TAXES.
////////////////
- 4) QUANTITIES: 25KBBLs EACH OF REGULAR LEADED AND REGULAR UNLEADED GASOLINE PLUS OR MINUS 10-0/0.
- 5) TERMS: TO ADD: PRODUCT LOADED ONTO REINAUER BARGE TO BE CONSIGNED TO FIRELINE PETROLEUM SUPPLY DISTRIBUTION COMPANY INC.

J. J. RYAN
DIRECTOR SUPPLY/DISTRIBUTION"

7. Approximately 24 hours before the gasoline was to be loaded for shipment, Lesez informed Harbor that it could not make timely delivery as per the agreement of June 26th and also renege on its agreement to pay for delivery.

8. Harbor, under pressure from Fireline, agreed to pay for the barging of the fuel to Albany if Lesez would expedite the shipment.

9. On July 7, 1984, Reinauer Transportation Company ("Reinauer") barge B-85 left Northville at Linden, New Jersey for the GATX terminal at Carteret, New Jersey. It left Carteret for Albany on July 8th and arrived at the Agway terminal in Albany on July 9th. Delivery was completed on July 10th. The cargo was verified as 49,818 barrels (2,086,253 gallons) of gasoline. Harbor was billed \$22,418.11 by Reinauer for barge transportation. Harbor paid said bill.

10. Harbor paid Lesez for the gasoline by an irrevocable commercial letter of credit in the amount of \$1,911,000.00, drawn on its bank, Citytrust, dated July 5, 1984 and expiring July 9, 1984. The beneficiary of the letter was Lesez Petroleum. The letter required that the following documents be produced before payment would be made:

- "1. A barge loading receipt from E.W. Saybolt and Co. evidencing shipment to Harbor Petroleum Corp.
2. A signed inspection certificate from E.W. Saybolt and Co. stating product meets A.S.T.M. standard spec. for regular leaded gasoline and regular unleaded gasoline and quantity.
3. A statement purportedly signed by an officer of the beneficiary stating the accountee has been shipped approximately 25,000 barrels regular leaded gasoline and approximately 25,000 barrels regular unleaded gasoline and payment has not been received.

4. Signed commercial invoices in duplicate stating that it [sic] covers:
Approximately 25,000 barrels regular leaded gasoline and approximately 25,000 barrels regular unleaded gasoline; all applicable New York State, County, and Federal taxes are included in the price."

Special conditions of the letter were stated as follows:

"SPECIAL CONDITIONS: It is a condition of this letter of credit that it will expire prior to the stated expiration date when the account party transfers by wire approximately \$1,911,000.00 to Lesez Petroleum Corp. which we understand will occur when the account party receives acknowledgement from E.W. Saybolt and Co. that the product has been loaded. Citytrust agrees with you that all drafts drawn under and in compliance with the terms of this credit will be duly honored if presented at our counters before the expiration date."

11. Fireline paid Harbor also by letter of credit. Payment was made when the quantity was verified upon loading in New Jersey by E. W. Saybolt & Co., Inc. ("Saybolt"), inspectors. Harbor and Fireline shared the costs of the Saybolt inspection.

12. The payments from Fireline to Harbor and from Harbor to Lesez were virtually contemporaneous.

13. Harbor received an invoice of Lesez (rather than Debbie Oil Corp., as stated in the telex) dated July 10, 1984 for the following:

<u>Gallons</u>	<u>Type</u>	<u>Cost Per Gallon</u>	<u>Total</u>
1,039,803	Regular	\$.89	\$ 925,424.67
1,047,564	No Lead	\$.93	<u>974,284.52</u>
		Total	\$1,899,659.19

The invoice stated that the amount included "Federal excise tax, State excise tax, Sales tax, County tax, Gr. Rec. tax & all applicable taxes".

The Telex Messages of July 3, 1984

14. There are three other telex messages dated July 3, 1984 in the record.

(a) A telex from Lesez to Harbor dated July 3, 1984 at 14:49 Eastern Standard Time stated as follows:

"CONFIRMING OUR TELEPHONE CONVERSATION ON 7/3/84
CONCERNING PURCHASE OF 50,000 BARRELS OF PETROLEUM
PRODUCTS.

25,000 BARRELS OF REGULAR AT .89 - 934,500.00
25,000 BARRELS OF NO-LEAD AT .93 - 976,500.00
TOTAL - \$1,911,000.00

PAYMENT FOR THE SAID BARRELS TO BE AS FOLLOWS:

HARBOR PETROLEUM SHALL PROVIDE AN IRREVOCABLE LETTER OF CREDIT MADE OUT TO LESEZ PETROLEUM CORP.

3631 HASMPTON [sic] ROAD
OCEANSIDE, NY 11572

TO CITIBANK
2243 JACKSON AVENUE
LONG ISLAND CITY, NY 11101
ATTENTION: ED ODOGART
ACCOUNT # 154-56078

ALSO HARBOR PETROLEUM WILL PAY UPON LOADING OF BARGE WIRE TRANSFER OF FUNDS FOR THE SUM OF \$1,911,000.00 PAYABLE TO LESEZ PETROLEUM CORP. ON BEHALF OF DEBBIE OIL CORP. TO ABOVE BANK.

LESEZ PETROLEUM CORP. WILL BE A COMMISSIONED BROKER IN THIS TRANSACTION YOU WILL RECEIVE YOUR INVOICES FROM THE SUPPLYING COMPANY DEBBIE OIL CORP. STATING ALL APPLICABLE TAXES ARE PAID."

(b) A telex from Harbor to Fireline dated July 3, 1984 at 15:15 Eastern Standard Time provided as follows:

"CONFIRMING ARRANGEMENTS BETWEEN FIRELINE PETROLEUM (JACK RYAN) AND HARBOR PETROLEUM CORPORATION (LARRY SMITH). FIRELINE PETROLEUM AGREES TO PURCHASE AND HARBOR PETROLEUM AGREES TO SELL THE HEREIN SPECIFIED COMMODITY UNDER THE TERMS AND CONDITIONS SET FORTH AS FOLLOWS:

COMMODITY: REGULAR LEADED GASOLINE AND UNLEADED REGULAR GASOLINE.

QUANTITY: MAXIMUM 25,000 BARRELS OF REGULAR LEADED GASOLINE PLUS OR
MINUS 10-0/0.

MAXIMUM 25,000 BARRELS OF UNLEADED REGULAR GASOLINE PLUS
OR MINUS 10-0/0.

MEASUREMENTS: SELLERS BARGE LOADED QUANTITY AT LOADING DOCK.

QUALITY: GOOD COMMERCIAL GRADE - TO MEET ASTM AND NEW YORK HARBOR SPECIFICATIONS.

DESTINATION: DELIVERED AGWAY TERMINAL ALBANY, NEW YORK
O/A JULY 7,
1984.

PRICE: \$.94 PER GALLON REGULAR GASOLINE PRICE INCLUDES ALL
APPLICABLE NEW YORK STATE, FEDERAL AND COUNTY
SALES TAX.
\$.99 PER GALLON UNLEADED REGULAR GASOLINE PRICE
INCLUDES ALL NEW YORK STATE, FEDERAL AND COUNTY
SALES TAX.

TERMS: AN IRREVOCABLE LETTER OF CREDIT PAYABLE TO HARBOR
PETROLEUM
CORPORATION, 15 LEXINGTON AVENUE, NEW HAVEN,
CONNECTICUT 06513 STATING FUNDS TO BE WIRED TO H.P.C.
BANK ACCOUNT AT CITY TRUST, 961 MAIN STREET,
BRIDGEPORT, CONN., ACCOUNT NUMBER #840-5158,
ATTENTION WILLIAM BARNHARDT UPON LOADED QUANTITY
BEING MEASURED BY INDEPENDANT [sic] INSPECTORS (E.W.
SAYBOLT & COMPANY) PRIOR TO VESSEL LEAVING SELLERS
DOCK. -- INSPECTION COSTS TO BE SHARED BETWEEN BUYER
AND SELLER.

IT IS FURTHER UNDERSTOOD AND AGREED THAT ALL ORDERS ARE
ACCEPTED SUBJECT TO AVAILABILITY OF PRODUCT TO SELLER AT
THE TIME OF DELIVERY AND WILL NOT BE LIABLE FOR ANY DELAY IN
PERFORMANCE OR IN DELIVERY OF PRODUCT OR ANY DAMAGE
SUFFERED BY BUYER BY REASON OF SUCH DELAY WHEN SUCH DELAY
IS DIRECTLY OR INDIRECTLY CAUSED BY THE UNAVAILABILITY OF
PRODUCT OR ANY OTHER CAUSE OR CAUSES BEYOND ITS CONTROL.

PLEASE ADVISE."

(c) A telex from Fireline to Harbor dated July 3, 1984 at 16:37 Eastern Standard Time
provided as follows:

"FIRELINE PETROLEUM SUPPLY DISTRIBUTION [sic] COMPANY INC.
CONCURS WITH THE CONTENTS OF SUBJECT SALES AGREEMENT
EXCEPT FOR THE FOLLOWING:

TERMS TO INCLUDE: PRODUCT LOADED ONTO BARGE TO BE
BONSIGNED [sic]

//////////

TO FIRELINE PETROLEUM SUPPLY DISTRIBUTION [sic] COMPANY,
INC."

It is not clear from the record whether the above telex messages pertain to a second shipment of gasoline (see Finding of Fact "15" et seq., *infra*), as stated in an affidavit of Mr. Smith which is in the record, or constituted a novation or modification of the first contract. Mr. Smith testified that before Harbor made the first shipment, Fireline asked to enlarge the first contract to double its

size. It is noted, however, that the selling prices in these telex messages appear to be consistent with the first shipment (see Finding of Fact "6[b]") not the second (see Finding of Fact "15"). Also the delivery date, July 7, is two days prior to the delivery of the first shipment in Albany (see Finding of Fact "9").

The Second Shipment

15. Shortly after delivery of the above shipment, Harbor entered into a similar arrangement for a second bargeload of gasoline with Fireline and Lesez. Assuming that the telex messages referred to in Finding of Fact "14" do not apply to the second shipment¹, the only document in the record setting forth the terms of this transaction with Fireline is a telex from Harbor to Fireline dated July 13, 1984 which states that Harbor offered the following:

"CONFIRMING ARRANGEMENTS BETWEEN FIRELINE PETROLEUM (JACK RYAN) AND HARBOR PETROLEUM CORPORATION (LARRY SMITH). FIRELINE PETROLEUM AGREES TO PURCHASE AND HARBOR PETROLEUM AGREES TO SELL THE HEREIN SPECIFIED COMMODITY UNDER THE TERMS AND CONDITIONS SET FORTH AS FOLLOWS:

COMMODITY: REGULAR LEADED GASOLINE AND UNLEADED
REGULAR GASOLINE.

QUANTITY: MAXIMUM 25,000 BARRELS OF REGULAR LEADED
GASOLINE PLUS
OR MINUS 10-0/0.
MAXIMUM 25,000 BARRELS OF UNLEADED REGULAR
GASOLINE PLUS OR MINUS 10-0/0.

MEASUREMENTS: SELLERS BARGE LOADED
QUANTITY AT LOADING
DOCK.

QUALITY: GOOD COMMERCIAL GRADE - TO MEET ASTM AND NEW
YORK
HARBOR SPECIFICATIONS.

DESTINATION: DELIVERED AGWAY
TERMINAL ALBANY, NEW
YORK O/A JULY 19,
1984.

¹As noted in Finding of Fact "14", there is conflicting evidence as to which of the two shipments the telex messages of July 3rd pertain. The Audit Division does not claim that there was a third shipment and there is no question as to the amount of fuel delivered. Accordingly, while the telex messages could be applicable to the second shipment, this would not affect the structure of the underlying transaction.

PRICE: \$.955 PER GALLON REGULAR GASOLINE PRICE
INCLUDES ALL
APPLICABLE NEW YORK STATE, FEDERAL AND COUNTY
SALES TAX.
\$1.015 PER GALLON UNLEADED REGULAR GASOLINE
PRICE INCLUDES ALL NEW YORK STATE, FEDERAL AND
COUNTY SALES TAX.

TERMS: AN IRREVOCABLE LETTER OF CREDIT PAYABLE TO
HARBOR
PETROLEUM CORPORATION, 15 LEXINGTON AVENUE,
NEW HAVEN, CONNECTICUT 06513 STATING FUNDS TO
BE WIRED TO H.P.C. BANK ACCOUNT AT CITY TRUST,
961 MAIN STREET, BRIDGEPORT, CONN., ACCOUNT
NUMBER #840-5158, ATTENTION WILLIAM BARNHARDT
UPON LOADED QUANTITY BEING MEASURED BY
INDEPENDANT [sic] INSPECTORS (E.W. SAYBOLT &
COMPANY) PRIOR TO VESSEL LEAVING SELLERS DOCK.
INSPECTION COSTS TO BE SHARED BETWEEN BUYER
AND SELLER.

IT IS FURTHER UNDERSTOOD AND AGREED THAT ALL ORDERS ARE
ACCEPTED SUBJECT TO AVAILABILITY OF PRODUCT TO SELLER AT
THE TIME OF DELIVERY AND SELLER WILL NOT BE LIABLE FOR ANY
DELAY IN PERFORMANCE OR IN DELIVERY OF PRODUCT OR ANY
DAMAGE SUFFERED BY BUYER BY REASON OF SUCH DELAY WHEN
SUCH DELAY IS DIRECTLY OR INDIRECTLY CAUSED BY THE UNAVAIL-
ABILITY OF PRODUCT OR ANY OTHER CAUSE OR CAUSES BEYOND ITS
CONTROL.

BARGE TO BE CONSIGNED TO FIRELINE PETROLEUM UPON RELEASE
OF FUNDS.

PLEASE ADVISE."

(The paragraph providing that Harbor would not be liable for delay beyond its control was inserted on the advice of counsel because of the problem arising from Lesez's delay with the first shipment. It also appears in Harbor's telex of July 3, 1984 [Finding of Fact 14(b)].)

This offer was accepted by Fireline, although the accepting telex is not in the record.

Assuming that the July 3 telex messages did not involve the second shipment, the agreement with Lesez for said transaction is not in the record. However, Lesez issued an invoice to Harbor dated July 18, 1984 stating as follows:

<u>Quantity in Gallons</u>	<u>Description</u>	<u>Unit Price</u>	<u>Total</u>
1,043,755	Regular	\$.88	\$ 918,504.40
1,038,485	No Lead	\$.92	955,406.20
	Total		\$1,873,910.60

The invoice stated that the total included "Federal excise tax, State excise tax, Sales tax, County tax, Gr. Rec. tax, & all applicable taxes". On the invoice were written the words "Product Loaded and Shipped 7/18/84".

16. On July 18, 1984, Reinauer barge ST-65 was loaded with 1,038,485 gallons of unleaded gasoline and 1,043,755 gallons of regular gasoline at the GATX terminal, Carteret, New Jersey. Reinauer transported the barge to the Agway terminal in Albany where it arrived and was unloaded on July 19, 1984. Harbor paid Reinauer \$22,306.60 for barge transportation.

17. Payment was made for the second shipment in the same manner as it was for the first: when Saybolt verified that the barge was loaded at Carteret, Harbor was paid under Fireline's letter of credit and Lesez was paid under Harbor's letter of credit. Again, Harbor and Fireline shared the costs for the Saybolt inspection.

The Audit

18. In September 1984, an auditor in the Miscellaneous Tax Bureau received a telephone call from New Jersey tax authorities stating that the two barges of gasoline involved in the above transactions had been shipped from New Jersey to New York. The auditor then contacted Harbor and Fireline and requested all information as to the transactions.

19. It was determined that Fireline reported to the State of New Jersey that the above-mentioned bargeloads had been shipped from GATX in Carteret, New Jersey and that a total of 4,155,698 gallons had been delivered to Fireline in Albany, New York. Fireline reported to the New York Department of Taxation and Finance that the gasoline had been purchased "tax paid" from Harbor.

20. No field audit was conducted. Based on documents submitted and telephone conversations with personnel at Harbor and Fireline, the auditor concluded that Harbor took title to the gasoline at issue in New Jersey and brought it into New York State by barge and was thus the importer of record both for motor fuel tax and sales tax purposes.

21. On September 21, 1984, the Audit Division issued to Harbor a Notice of Determination of Tax Due under Motor Fuel Tax Law for \$333,573.28 in tax and \$16,678.66 in penalty, for a total of \$350,251.94 (the tax was calculated on 4,169,666 gallons at \$.08 per gallon).

22. On November 14, 1984, the Audit Division issued to Harbor and to Lawrence E. Smith, as officer, notices of determination and demands for payment of sales and use taxes due, each providing for \$309,186.21 in sales tax due, \$18,551.17 in penalty and \$5,639.55 in interest, for a total of \$333,376.93.

Additional Facts

23. In September 1984, Harbor's president discussed another transaction with Lesez. A telex sent to Harbor by Lesez on September 11, 1984 at 12:09 Eastern Standard Time offered:

"CONCERNING OUR TELEPHONE CONVERSATION ON 9/11/84

CONCERNING 25,000 BARRELS OF REGULAR GASOLINE AT .885 PER GALLON AND 5,000 BARRELS OF PREMIUM GASOLINE AT .965 PER GALLON. PRODUCT TO BE LOADED [sic] ON BARGE PROVIDED BY HARBOR PETROLEUM.

PAYMENT FOR THE SAID BARRELS TO BE AS FOLLOWS:

HARBOR PETROLEUM CORP. SHALL PROVIDE AN IRREVOCABLE [sic] LETTER OF CREDIT MADE OUT TO LESEZ PETROLEUM CORP. HARBOR UPON CONFIRMATION OF LOADING WILL WIRE TRANSFER THE APPROX. SUM OF \$1,131,900 TO LESEZ PETROLEUM CORP.

HARBOR PETROLEUM CORP. WILL RECEIVE INVOICES FROM LESEZ PETROLEUM CORP. STATING ALL APPLICABLE [sic] TAXES ARE PAID.

THANKING YOU IN ADVANCE FOR DOING BUSINESS WITH OUR COMPANY."

Due to the problems with New York State motor fuel and sales taxes resulting in the assessments at issue, the transaction was never consummated.

24. The State of New Jersey issued an assessment of \$375,674.10 to Harbor with respect to the two shipments. On September 12, 1984, Harbor's accountant wrote to the New Jersey Department of the Treasury submitting copies of the Lesez invoices and other documents requesting that the assessments be cancelled. There is nothing in the record to indicate what happened to the New Jersey assessments.

25. On or about March 11, 1987, David Bogatin, president of Lesez, pleaded guilty to two counts of a 19-count indictment charging that he evaded sales tax on gasoline purchases.

26. Lesez was indicted for motor fuel tax evasion. The indictments were apparently pending at the time of the hearing.

27. Petitioner Lawrence E. Smith did not contest the allegation that he was a person required to collect sales tax on behalf of Harbor.

CONCLUSIONS OF LAW

A. That, during the period at issue, Tax Law § 284.1 imposed an excise tax of four cents per gallon upon motor fuel sold within the State of New York by a distributor, except under certain limited circumstances which do not apply here. Tax Law § 284-a provided for an additional motor fuel tax of three cents per gallon upon motor fuel sold within New York by a distributor. Tax Law § 284-c provided for a supplemental motor fuel tax of one cent per gallon upon motor fuel sold within New York by a distributor.

B. That, during the period at issue, Tax Law § 282.1 defined the term "distributor" as meaning "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...."

C. That, during the period at issue, Tax Law § 1101(b)(4), pertaining to the definition of

retail sale for purposes of sales and use tax under Article 28 of the Tax Law, provided, in pertinent part, as follows:

"(ii)...a sale of automotive fuel by a distributor is deemed to be a retail sale, except for a sale of automotive fuel by a distributor to a purchaser duly registered with or licensed by the taxing authorities of another state as a distributor of or dealer in automotive fuel therein, for immediate exportation from the state into such other state, provided the distributor making such sale complies with all regulations of the tax commission relating thereto.

* * *

(A) 'Automotive fuel' means diesel motor fuel as defined in section two hundred eighty-two-a of this chapter..., or motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter.

* * *

(B) The term 'distributor' shall have the same meaning as it has for purposes of article twelve-A of this chapter, excluding persons who are not required pursuant to section two hundred eighty-two-a to pay the tax imposed thereby."

D. That the contracts herein provided for the gasoline to be delivered to Fireline at the Agway terminal at Albany. Accordingly, the contracts were destination contracts and title to the goods passed upon delivery to Fireline at Albany (Uniform Commercial Code § 2-401[2]). This is true notwithstanding the fact that Fireline paid for the fuel when it was loaded onto the barges in New Jersey. It is also noted that the risk of loss was on Harbor until the gasoline was delivered at Albany (Uniform Commercial Code § 2-509[1][b]).

E. That Harbor imported motor fuel or caused motor fuel to be imported into New York State for distribution or sale within the State. Accordingly, Harbor was a distributor within the meaning of Tax Law § 282.1 and Tax Law § 1101(b)(4)(ii)(B) and was liable for motor fuel tax and sales and use taxes. It did not act merely as a broker in the transactions. The fact that Harbor was the victim of an unscrupulous seller does not alter its liability. Harbor was responsible for determining that the proper tax was paid (Mira Oil Co. v. Chu, 114 AD2d 619, appeal dismissed 67 NY2d 756, lv denied 68 NY2d 602).

F. That petitioners' argument that imposition of New York State sales tax is unconstitutional is without merit. The fuel was delivered by Harbor to Fireline in New York State and there clearly was sufficient nexus for taxability.

G. That in view of the fact that Harbor was misled by Lesez into believing that all taxes had been prepaid, petitioners have established reasonable cause for Harbor's failure to pay and the delay is excusable. Accordingly, penalties assessed under Tax Law § 289-b(1) and Tax Law § 1145(a)(1) are cancelled (Mira Oil Co., State Tax Commission, December 20, 1983).

