STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CERTIFIED HEATING OILS, INC.	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9, Section 182-a of the Tax Law for the Period July 1, 1981 through June 30, 1983.	:	

Petitioner, Certified Heating Oils, Inc., 93 Wright Avenue, Staten Island, New York 10303, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9, Section 182-a of the Tax Law for the period July 1, 1981 through June 30, 1983 (File No. 801733).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 22, 1990 at 1:15 P.M., with all briefs to be filed by August 17, 1990.[1] Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Patricia Brumbaugh, Esq. and Peter J. Martinelli, Esq., of counsel).

[1]After the conclusion of the hearing and the submission of petitioner's brief and the Division of Taxation's answering brief, petitioner brought a motion to compel discovery and/or reopen the hearing for further proof. The motion was denied, and petitioner was given until August 17, 1990 to submit its reply brief.

ISSUES

I. Whether the Division of Taxation properly concluded that petitioner imported petroleum into New York for sale in New York and therefore was liable for gross receipts tax under Tax Law § 182-a.

II. Whether the Division of Taxation properly refused credits which petitioner claimed for gross receipts tax allegedly paid to its suppliers.

III. Whether petitioner has established that its failure (if so concluded) to file returns and to pay tax required to be shown on such returns was due to reasonable cause and not due to willful neglect so as to justify the abatement of penalties, and whether a penalty imposed for negligence should also be cancelled.

FINDINGS OF FACT

Petitioner, Certified Heating Oils, Inc., according to the testimony of its officer, Joseph J. Marino, Jr.[2] started selling gasoline in early 1980. During the years at issue, petitioner sold gasoline to three privately-owned gasoline stations on Staten Island, New York. Although these three stations were branded "Certified", i.e., the stations sold gasoline under the name Certified, petitioner and/or Joseph J. Marino, Jr., did not have an ownership interest in any of the gasoline stations. However, it is not known whether Joseph J. Marino, Sr. had an ownership interest in them.

Petitioner serviced the three gasoline stations with two trucks that transported gasoline from two terminals in New Jersey and from one in Inwood, Long Island, New York. Petitioner had no storage tanks in New York and deliveries were made within one day to the Staten Island gas stations. Petitioner introduced into evidence, as petitioner's Exhibit "1", photocopies of

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[2]The audit report, the Division of Taxation's Exhibit "F", noted that Joseph Marino, Sr. was the sole owner of petitioner. The particular corporate office held by Joseph J. Marino, Jr. was not specifically noted in the record. The powers of attorney introduced into evidence, as part of the Division of Taxation's Exhibit "B", were executed by a Joseph J. Marino (without junior or senior specified), who was described therein as vice-president of petitioner. Mr. Marino, Jr. was the only witness produced by petitioner. The Division of Taxation did not present any witnesses.

some invoices from Ashland Petroleum Company (hereinafter "Ashland") and BP Oil, Inc. (hereinafter "BP") which show that petitioner purchased gasoline from Ashland and BP at their Linden, New Jersey[3] and Tremley Point, New Jersey terminals, respectively. Petitioner also purchased gasoline from Crown Central Petroleum Corp. (hereinafter "Crown Petroleum"), taking product at Wechter Brothers' delivery plant in Inwood, New York.

On the Ashland invoices, "various N.Y. destinations 11000" is shown in the box labeled "consignee", "Linden NJ" in the box labeled "Shipped From", and "XXXX 000001" in the box labeled "Shipped Via". On the BP invoices, "transport" is shown in the box labeled "Shipped Via".

Mr. Marino first testified that BP was his principal supplier of gasoline and then backpedaled, testifying that:

> "During this period, Ashland may have been my principal supplier, I don't recall. I really don't know."[4]

The photocopies of invoices introduced into evidence by petitioner were extremely limited in number showing the purchase of 26,700 gallons of gasoline from Ashland pursuant to three invoices dated July 7, 1981, July 9, 1981 and July 13, 1981, respectively; 14,977 gallons of gasoline from BP pursuant to three invoices dated March 27, 1982 and two dated March 30, 1982; and 9,000 gallons of gasoline from Crown Petroleum pursuant to three invoices[5] with

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[3]Mr. Marino testified that because his trucks were top loading trucks they could not draw product at Ashland's terminal in Linden, New Jersey. Instead, "[t]his Ashland product came out of Citgo's terminal" in New Jersey, although Mr. Marino did not specify the location of Citgo's terminal in New Jersey.

[4]Included in petitioner's Exhibit "2" is a schedule showing Ashland's refinery sales to petitioner for the period July 1, 1981 through June 30, 1983. Such sales amounted to approximately $700,000.00.

[5]These three invoices were introduced after the hearing pursuant to permission granted at the hearing for their later submission. A few invoices for fuel oil purchased by petitioner in New Jersey from Crown Petroleum and Mobil Oil Corp. were also included in petitioner's Exhibit "1".

"ship/issue dates" of January 4, 1981, December 25, 1981 and February 1, 1982, respectively.

On March 30, 1983, the Division of Taxation's Oil Tax Task Force received from petitioner a response to its inquiry concerning petitioner's potential liability for gross receipts tax under Tax Law § 182-a. Petitioner noted in its response that: it was taxable under Article 9-A of the Corporation Franchise Tax Law; it sold petroleum; petroleum was purchased by it or delivered to it from a location outside New York occurring more than once or twice a year; the petroleum purchased outside New York was picked up by petitioner's trucks;[6] and petitioner was not principally engaged in selling fuel used for residential purposes.

According to the field audit report dated December 20, 1984, a New York State miscellaneous tax audit completed on March 27, 1983 corroborated that:

> "(A)ll of Certified purchases are made from New Jersey sources and picked up in New Jersey by Certified's own trucks for importation and sale in New York State."

The audit procedure was described, in relevant part, in the audit report as follows:

> "The auditor reviewed purchase invoices and found that Certified imported petroleum into New York State via its own trucks as early as July 1, 1981. Based on this and on Mr. Shall's [petitioner's accountant at the time of the audit] statement that less than 50 percent of Certified's gross sales were residential fuel oil, the auditor deemed Certified to be liable for the 182-a tax for the entire two year period 7/1/81 to 6/30/83.
>
> The auditor requested Mr. Shall to supply him with an analysis of resales to 182-a taxpayers and residential fuel oil sales, however, Mr. Shall claimed that due to the poor condition of the books and records this data would take a long time to prepare. Subsequently, on June 29, 1984, Mr. Shall wrote the auditor a letter disclaiming his client's liability for the 182-a tax based on his belief that his client is not importing and that his client's supplier's [sic] are collecting the 182-a tax anyway. The auditor's efforts, through both correspondence and conversations, to convince Mr. Shall of his erroneous contentions proved futile, and the analysis of 182-a resales and residential fuel oil sales were never provided.
>
> Using Federal 1120 returns and NYS CT-3 reports the auditor calculated Certified's 182-a tax liability for the two year period without regard to any exclusions and with a NYS allocation of 100 percent."

The auditor determined petitioner's gross receipts as follows:

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[6]Mr. Marino testified that the handwriting on the response, which noted this fact, was not his writing. It is not known whether it was his father's.

	7/1/81 - 12/31/81	1982	1/1/83 - 6/30/83
Gross receipts per audit	$2,871,006.00[7]	$5,742,011.00	$2,324,130.00[8]

The auditor then applied the .75% gross receipts tax rate against 100% of the above amounts and determined tax due of $21,533.00, $43,065.00 and $17,431.00 for July 1, 1981 through December 31, 1981, for 1982 and for January 1, 1983 through June 30, 1983, respectively. The auditor also calculated penalties for failure to file returns, failure to pay tax, and for negligence.

The Division of Taxation then issued statements of audit adjustment and notices of deficiency, all dated January 10, 1985, showing tax due of $21,533.00, $43,065.00 and $17,431.00 for July 1, 1981 through December 31, 1981, for 1982 and for January 1, 1983 through June 30, 1983, respectively, plus penalty and interest. Each of the statements of audit adjustment explained that the deficiency for the respective period was "based on recent field audit".

During the period at issue, petitioner could not purchase gasoline without paying its suppliers New York motor fuel tax, because it was not a licensed importer. Petitioner also claims that it paid its suppliers the gross receipts tax at issue. It is observed that the Ashland, BP and Crown Petroleum invoices introduced into evidence by petitioner, although limited in number, separately state the New York motor fuel tax. However, the gross receipts tax at issue herein is not separately stated on any of the invoices. Further, there is pre-printed language on Ashland's invoices that provides as follows:

> "All products are sold tax-free and Ashland Petroleum Company has not assumed the responsibility to pay any federal diesel fuel tax, and other federal tax, or any

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[7] The auditor took 50% of petitioner's gross receipts reported on its 1982 Federal corporate tax return. The record does not include an explanation why 1981 receipts were not utilized.

[8] The auditor took 50% of petitioner's gross receipts reported on its 1983 Federal corporate tax return.

state or local tax except those taxes in the amounts itemized on this invoice."

Approximately four years after the issuance of the notices of deficiency, pursuant to a schedule dated April 20, 1989 which was introduced into evidence as the Division of Taxation's Exhibit "G", the Division reduced the tax alleged due after determining that 7.157% of petitioner's sales during 1981 were residential fuel oil sales. This same percentage was then applied to gross receipts for 1982 and the period January 1 through June 30, 1983. As a result, the revised gross receipts tax asserted as due by the Division is $19,991.00, $39,983.00, and $16,183.00 for July 1, 1981 through December 31, 1981, 1982 and January 1, 1983 through June 30, 1983, respectively, plus penalty and interest.

It is observed that petitioner introduced no evidence to challenge the percentage of residential fuel oil sales used in this revision.

Mr. Marino testified that Ashland, BP and Crown Petroleum (petitioner's gasoline suppliers) provided a reduced price because petitioner transported the gasoline from their terminals to the gasoline stations. But other than Mr. Marino's testimony, no other evidence was presented to corroborate this allegation. Petitioner also alleges that its gasoline suppliers, all major oil companies, determined that they would take responsibility for paying the gross receipts tax at issue herein and included this tax in the price of the product. In support of this allegation, petitioner introduced the following evidence:

1. A letter dated January 16, 1985 of Robyn M. Ruppersberger of Crown Petroleum's Corporate Tax Department to petitioner stating that Crown Petroleum "has paid the New York Gross Receipts Tax from January 1, 1981[9] to June 30, 1983 which is the period of time that you purchased product from us";

2. An affidavit dated February 18, 1986 of James A. Franklin, Ashland's supervisor of oil franchise taxes. Mr. Franklin stated that Ashland's New York oil franchise tax returns included the sales to petitioner and Ashland "paid the appropriate amount of tax due under the law." Mr. Franklin also noted in his affidavit that the Division of Taxation "verified upon audit that all oil franchise taxes due on Ashland's sales, including sales to Certified Heating Oil [sic], Inc., were properly reported and paid to New York"; and

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[9] The gross receipts tax did not become effective until July 1, 1981.

3. An affidavit dated December 14, 1988 of Robert R. Nunnelley, Sohio Oil Company's [the successor corporation to BP] audit coordinator in its corporate excise and sales tax department, which stated that "all oil franchise taxes due on BP Oil's sales, including sales to Certified Heating Oils, Inc. were properly reported and paid to New York", and that BP's tax returns had been audited and verified by the Division of Taxation.

Petitioner asserts that its gasoline suppliers sold gasoline to it in New York based on the gasoline's destination, not in New Jersey, where most of the gasoline was loaded. It further asserts that it obtained title to the gasoline when it paid for it (which was usually about a week after it was loaded in its trucks and delivered to its three customers). However, other than the testimony of Mr. Marino, a party witness, petitioner did not introduce any evidence in support of these assertions.

Mr. Marino could not recall the exact name of his accountant, who he testified advised him during the period at issue: "His last name was Find or Frind. I'm not sure."

SUMMARY OF THE PARTIES' POSITIONS

According to petitioner, its gasoline suppliers paid the gross receipts tax which the Division now seeks to collect improperly from it. The gasoline was sold to petitioner with a New York destination thereby making its suppliers the importers of the gasoline, who filed and paid the tax at issue. Further, petitioner asserts that it was primarily a trucking company and should not be considered an oil company.[10]

In contrast, the Division of Taxation argues that petitioner obtained gasoline in its own name and therefore was not primarily a trucking company. Further, petitioner sold gasoline to individual gasoline stations in New York and therefore is properly viewed as an oil company for

[10]Petitioner's representative in his closing argument stated that the gross receipts tax statute was not designed to impose taxes on a person who is primarily a trucking company, but rather was designed to tax "the major suppliers of gasoline into the State of New York." He also stated that there was a threshold of sales of 60 million gallons before the gross receipts tax applied and reserved the right to submit "a certified accountant's report of the amount of gasoline that was purchased by Certified...." No such certification was submitted nor was any legislative history cited or submitted in support of the assertion that only the major oil companies were liable for the gross receipts tax at issue herein. It is observed that during the year 1980 only, the tax imposed under Tax Law § 182, as in effect during 1980, included a threshold of sales of 60 million gallons. However, such tax is not at issue herein.

purposes of Tax Law § 182-a since it was the active party bringing gasoline into New York for sale within New York. Finally, petitioner failed to sustain its burden of proving that its suppliers paid the gross receipts tax at issue.

CONCLUSIONS OF LAW

A. During the period at issue, Tax Law former § 182-a[11] imposed an additional tax on oil companies, a so-called "gross receipts tax". For purposes of this tax, "oil company" was defined at section 182-a(2)(a) as follows:

> "The term 'oil company' means every corporation formed for or engaged in the business of importing or causing to be imported (by a person other than a corporation subject to tax under this section) into this state for sale in this state, extracting, producing, refining, manufacturing, or compounding petroleum. Provided, however, a corporation which is principally engaged in selling fuel oil (excluding diesel motor fuel) used for residential purposes shall not be considered an oil company. For purposes of this section, petroleum shall include, but shall not be limited to, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, distillate fuels, residual oil, crude oil or any similar product."

B. The Division of Taxation's conclusion that petitioner was an "oil company" for purposes of the gross receipts tax was rational. As noted in Finding of Fact "2", the substance of petitioner's business operations was the sale of gasoline to three Staten Island gasoline stations that then resold the gasoline to motorists under the brand name "Certified". The gasoline stations did not purchase the gasoline from the three major oil companies involved herein. Rather, petitioner purchased the gasoline and resold it to the gasoline stations. Petitioner's contention that it merely transported the gasoline is not substantiated by the evidence.

Further, petitioner's contention that title to the gasoline did not pass to it until it paid for the gasoline, about a week after the gasoline had been loaded by petitioner into its trucks and delivered to its customers, is without merit. UCC 2-401(2) provides, in part, as follows:

> "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods...."

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[11]Laws of 1983 (ch 400) repealed section 182-a. Tax Law Article 13-A replaced the former franchise taxes on oil companies.

The gasoline that petitioner purchased from Ashland and BP was physically delivered in New Jersey. Therefore, title to the gasoline passed to petitioner in New Jersey. Petitioner's argument that title did not pass to it until a later date must be rejected. Petitioner failed to prove that it had an explicit agreement with either Ashland or BP that title to the gasoline passed at a time other than when physical delivery was made. Therefore, the provision in UCC 2-401(1) that "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties" (emphasis added) is inapplicable. Consequently, since petitioner took possession of the gasoline purchased from Ashland and BP in New Jersey and transported it to New York for delivery to its customers, the three Staten Island gasoline stations, petitioner engaged in the business of importing petroleum. Therefore, it was properly viewed as an "oil company" for purposes of Tax Law § 182-a (cf., Mira Oil Company v. Chu, 114 AD2d 619, 494 NYS2d 458, appeal dismissed 67 NY2d 756, 500 NYS2d 1027, lv denied 68 NY2d 602, 505 NYS2d 1026; Matter of Harbor Petroleum Corp., Tax Appeals Tribunal, September 21, 1989).

C. As noted in Finding of Fact "5", supra, the audit report noted that, in determining petitioner's liability for the period July 1, 1981 through December 31, 1981, the auditor took 50% of petitioner's gross receipts reported on its 1982 Federal corporate tax return. The record does not include an explanation why 1981 receipts were not utilized. Although this is somewhat troubling, during the entire period at issue petitioner serviced the same three gasoline stations so that receipts for 1981 and 1982 should be within the same range. Therefore, it can be concluded that there was a rational basis for the Division of Taxation's estimate of petitioner's gross receipts for the 1981 period based upon 50% of its 1982 gross receipts, especially in light of petitioner's failure to introduce any evidence to show the estimate was inaccurate (cf., Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219).

D. Furthermore, it is concluded that the Division of Taxation properly refused credits which petitioner claimed for gross receipts tax allegedly paid to its gasoline suppliers. The

evidence introduced by petitioner failed to sustain its burden of proving entitlement to such credits (cf., Matter of Mira Oil Company v. Chu, supra; Matter of Harbor Petroleum Corp., supra).

It is observed, as noted in Finding of Fact "7", supra, that petitioner's invoices from Ashland, its primary supplier, explicitly noted that Ashland "has not assumed the responsibility to pay...any state...tax except those taxes...itemized on this invoice." Only the New York motor fuel tax was separately stated on the invoices (which were also limited in number).

E. Petitioner did not offer sufficient justification to abate the penalties which had been imposed under Tax Law § 1085 for its failure to file returns for gross receipts tax, to pay tax required to be shown on the returns, and for its negligence in failing to do so (cf., Matter of Echo Bay Yacht Club, Inc., Tax Appeals Tribunal, December 28, 1990; Matter of Erikson, Tax Appeals Tribunal, March 22, 1990). In Erikson, supra, the Tribunal noted:

> "The grounds which have established petitioner's lack of reasonable cause and willful neglect also suffice in this instance to demonstrate his negligence."

There is no doubt that the taxation of oil companies is a complex matter, and petitioner's position is not wholly unreasonable. However, petitioner offered no evidence to show that it took adequate steps to ensure that it complied with the Tax Law. As noted in Finding of Fact "11", supra, Mr. Marino, petitioner's only witness, could not recall the exact name of his accountant during the period at issue. Furthermore, petitioner failed to provide any evidence that, in fact, he relied on advisors during the period at issue and that his advisors, if any, were competent to give advice on the taxation of oil companies. (It appears that Mr. Shall, mentioned in Finding of Fact "5", supra, was employed by petitioner during the audit, not during the period under audit.)

F. The petition of Certified Heating Oils, Inc. is denied, and the three notices of deficiency dated January 10, 1985 are sustained, except to the extent they were reduced, as noted in Finding of Fact "8", supra.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE