STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MENDON LEASING 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 December 1, 1980 through November 30, 1984.	:	

Petitioner, Mendon Leasing Corp., 362 Kingsland Avenue, Brooklyn, New York 11222, 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 December 1, 1980 through November 30, 1984 (File No. 802763).

On December 6, 1988 and January 5, 1989, respectively, petitioner and the Division of Taxation, through their duly authorized representatives, waived a hearing and agreed to submit the case for determination based on a stipulation of facts agreed to by the parties hereto and memoranda of law to be submitted by the parties by May 12, 1989. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether petitioner should be allowed a credit for sales taxes paid to its fuel distributor on gasoline that was later sold to petitioner's truck lease customers between September 1, 1982 and November 30, 1984, upon which it collected and remitted sales tax.

FINDINGS OF FACT

Pursuant to 20 NYCRR 3000.7, the parties hereto, by their respective representatives, executed a stipulation of facts in this matter. Said stipulation is set forth below.

Petitioner, Mendon Leasing Corp., is a truck leasing company incorporated under the laws of New York State with its principal place of business in Brooklyn, New York. During the period in issue, it provided trucks to various customers under one of two types of truck lease and service agreements. The typical term for both types of leases was five years.

Under the first type of truck lease and service agreement, known as an "x-fuel lease", the customer was responsible for providing fuel at its own cost.

(a) Before September 1, 1982, petitioner provided its fuel distributor with a resale certificate and, accordingly, did not pay sales tax to the distributor. During this period, customers who leased trucks under an x-fuel lease were separately billed by petitioner for any fuel (gasoline and diesel) that petitioner provided to the customer. Sales tax was collected on

these separate fuel billings and paid over to the New York State Department of Taxation and Finance.

(b) From September 1, 1982 to May 31, 1983, petitioner collected (and paid to New York State) sales tax from its customers on all of its separate fuel billings under x-fuel leases. In addition, petitioner paid sales tax on its purchases of gasoline from its fuel distributor. The actual sales tax paid to the distributor was taken as a credit in petitioner's sales tax accrual account.

(c) From June 1, 1983 to the end of the period in issue, petitioner paid sales tax to its distributor on all gasoline purchases. Petitioner collected (and paid to New York State) sales tax from its customers under x-fuel leases on only diesel fuel billings.

Under the second type of truck lease and service agreement, known as a "wet lease", petitioner provided fuel at its own cost. These costs were included in the lease rate charged to the customer.

(a) Approximately 60 percent of petitioner's truck leases with customers were "wet leases".

(b) Before September 1, 1982, petitioner provided its fuel distributor with a resale certificate and, accordingly, did not pay sales tax to the distributor.

From September 1, 1982 to the end of the period in issue, petitioner paid sales tax to its fuel distributor on all gasoline purchases. During this period, the lease charges paid by customers under wet leases included petitioner's cost of gasoline. Sales tax was, in turn, collected (and paid to New York State) on such lease charges. Consequently, petitioner paid

sales tax twice on gasoline provided under wet leases.

(c) The actual sales tax paid to petitioner's distributor on gasoline from September 1, 1982 to May 31, 1983 was taken as a credit in petitioner's sales tax accrual account.

(d) From June 1, 1983 to the end of the period in issue, the sales tax paid to the distributor on the amount of gasoline provided to petitioner's customers under wet leases was taken as a credit in petitioner's sales tax accrual account. During this period, petitioner paid a total of $281,581.13 in sales tax to its distributor on gasoline purchases of 2,673,367 gallons. Petitioner provided approximately 1,652,871 gallons of this gasoline to its customers under wet leases. Because petitioner was charging sales tax on the total billings under wet leases, which billings included a charge for the price of gasoline paid to petitioner's distributor, petitioner collected, and paid to New York State, sales tax on the 1,652,871 gallons of gasoline provided to its wet lease customers. Petitioner took as a credit the amount of sales tax paid to its distributor on the 1,652,871 gallons of gasoline.

(e) Customers under wet leases were typically billed monthly. In addition to a fixed weekly lease rate, such customers were charged for the total miles traveled by the leased truck during the month. The per-mile rate that petitioner charged the customer was set forth in Schedule "A" of the wet lease. This rate included an amount for fuel consumption and a basic mileage charge.

(f) Petitioner also charged customers under wet leases for any increases in petitioner's fuel costs that occurred during the lease period. The rate of adjustment for each $0.01 increase in petitioner's fuel cost per gallon was set forth in Schedule "A" of the wet lease.

The total amount of sales and use taxes that the Division of Taxation alleges petitioner

owes arises solely from the credits discussed in paragraphs 2(b), 3(c), and 3(d) of the stipulation. These credits were for sales tax paid by petitioner to its fuel distributor on gasoline that petitioner subsequently provided to its customers (under both x-fuel and wet leases) and on which petitioner collected and (again) paid sales tax. The credits thus ensured that petitioner would pay sales tax once and only once on gasoline purchased from its distributor and provided to its truck lease customers.

In an examination of petitioner's sales and use tax returns for the period in issue, the Division of Taxation took the position that petitioner was not entitled to the credits against its sales tax accrual account for the transactions described in paragraphs 2(b), 3(b), 3(c), and 3(d) of the stipulation. On September 11, 1985, the Division of Taxation issued notices of determination and demands for payment of sales and use taxes due in the aggregate amount of $236,661.26 plus interest for the period December 1, 1980 through November 30, 1984.

On November 12, 1985, petitioner filed a petition with the former State Tax Commission, objecting to the notices of determination.

On January 20, 1987, petitioner filed a withdrawal of petition for a portion of the Division's proposed determination. Of the $236,661.26 total determination, petitioner agreed to pay $22,934.11 plus interest and the Division of Taxation cancelled $2,399.16. Petitioner continued to disagree with the remaining $211,327.99 determination.

On June 10, 1987, petitioner filed a perfected petition in light of the previous withdrawal of petition.

The following additional findings of fact are hereby made.

The field audit report provided the following detail concerning the determination by the Division of Taxation that petitioner owed additional sales tax with regard to its sales tax accrual account. "The vendor erroneously deducted $235,159.73 from the sales tax accrual account. This was primarily based on the fact that on lease contracts that included gasoline, the vendor would combine these two types of sales and charged [sic] sales tax thereon. The vendor subsequently deducted sales tax from the accrual account to recoup the sales tax he had paid to his distributor."

The record on submission does not allocate the claimed credit for sales tax paid by petitioner on its purchases from its fuel distributor of $211,327.99 between the sales tax collected on sales of motor fuel (1) to x-fuel lease customers and (2) to wet lease customers.

An example of a fuel billing by petitioner to an x-fuel lease customer provided by the parties as an exhibit to the stipulation shows the computation of a "charge for fuel supplied by Mendon locations" as consisting of 78.3 gallons at $1.20 per gallon for an amount totalling $93.96. Sales tax of $7.75 is separately shown and added for an invoice total of $101.71.

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation argues that petitioner was not authorized by the Tax Law to charge sales tax on its sale of motor fuel to its customers who leased trucks from it and should not be allowed credits for sales tax paid on its purchases from its fuel distributor against the amount of sales tax collected from its customers. Petitioner contends, by contrast, that by disallowing credits for sales tax paid on its purchases from its fuel distributor it would be subject to double taxation of gasoline provided to its lease customers.

CONCLUSIONS OF LAW

A. Beginning September 1, 1982 (L 1982, chs 454 and 469) and during the period that remains in issue here, September 1, 1982 through November 30, 1984, the retail sales tax on motor fuel was collected on sales by distributors to non-distributors because Tax Law § 1101(b)(4)(former [ii]), as in effect during the period in issue, provided that "a sale of automotive fuel by a distributor is deemed to be a retail sale". The tax was thus imposed at a higher point in the distribution chain than the point of sale by petitioner to its lease customers.

B. Under Tax Law § 1101(b)(4)(iii)(former [F]), as in effect during the period in issue, the term "retail sale" did not include "[t]he sale of any automotive fuel by any person other than a distributor", and under Tax Law § 1111(e)(former [4]), as in effect during the period in issue, the tax collected by petitioner's distributor from it should have been passed through to petitioner's lease customers, the ultimate consumer. (See Matter of Fourth Day Enterprises, Inc., Tax Appeals Tribunal, October 27, 1988 [for an excellent discussion of the system for the collection of the sales tax on motor fuel during the period in issue and how it contrasts with the current system].) Instead, petitioner as a non-distributor improperly collected additional sales tax from its x-fuel lease customers instead of merely passing through the sales tax it had paid to its distributor.

C. Under Tax Law § 1139(a), "No refund or credit shall be made to any person of tax which he [erroneously, illegally or unconstitutionally] collected from a customer until he shall first establish to the satisfaction of the tax commission...that he has repaid such tax to the customer." Petitioner erroneously collected sales tax from its x-fuel lease customers on direct sales of gasoline to those customers from petitioner's locations. To permit it to credit sales tax it had paid to its distributor against the sales tax it collected from its customers would, in effect, permit petitioner to obtain a refund or credit of the sales tax it erroneously collected without

first establishing that it has repaid such tax to its x-fuel lease customers. (See Matter of Darien Lake Fun Country, Inc. v. State Tax Commission, 68 NY2d 630; Matter of Saltzman v. New York State Tax Commission, 101 AD2d 910.)

D. On the other hand, because Tax Law § 1101(b)(5) defines "sale" to mean "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume...", petitioner's imposition of sales tax on the lease charges paid by its "wet lease" customers was proper.

E. Under Tax Law § 1111(e)(former [4]), as in effect during the period in issue, it is expressly stated that nothing in Article 28 of the Tax Law shall be construed to require the payment of sales and use taxes more than once on automotive fuel sold within the State. The tax regulations at 20 NYCRR 560.7 elaborate further that "a credit or refund may be allowed for tax previously paid on the sale of tangible personal property" if taxes are "imposed upon the sale or use of automotive fuel even though such fuel may previously have been subject to the taxes imposed upon the sale or use of tangible personal property".

F. As noted in the stipulated findings of fact, petitioner collected and remitted sales taxes from its wet lease customers on gasoline upon which it had previously paid sales tax to its fuel distributor. Unlike the sales tax it erroneously collected upon the sale of gasoline to its x-fuel lease customers, the taxes collected from its wet lease customers were not erroneously collected because such taxes were on lease charges or adjustments to lease charges rather than on the direct sale of gasoline. Consequently, the law and regulation described in Conclusion of Law "E", supra, should be applied to avoid the imposition of sales tax more than once on the gasoline that was ultimately used by petitioner's wet lease customers.

G. The petition of Mendon Leasing Corp. is granted to the extent that the Division of

Taxation is directed to determine an allocation of the claimed credit for sales tax paid by petitioner on its purchases from its fuel distributor of $211,327.99 between the sales tax collected on sales of motor fuel (1) to x-fuel lease customers and (2) to wet lease customers. The notices of determination and demands for payment of sales and use taxes due dated September 11, 1985 are reduced by the portion of the $211,327.99 which the Division of Taxation determines is allocable to the sales tax collected by petitioner on sales of motor fuel to wet lease customers. In all other respects, the petition of Mendon Leasing Corp. is denied.

DATED: Troy, New York
July 27, 1989

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE