STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

SCHULTIS SERVICE
STATION, INC. :

DETERMINATION

for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the Tax
Law for the Years 1982 through 1986. :

Petitioner, Schultis Service Station, Inc., 277 West Sunrise Highway, Freeport, New York 11520, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the years 1982 through 1986 (File No. 803426).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 22, 1988 at 1:15 P.M., with all briefs to be submitted by July 11, 1988. Petitioner appeared by Neal S. Dobshinsky, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly assessed additional tax due pursuant to Tax Law Article 12-A for the period January 1982 through February 1986.

II. Whether petitioner was entitled to a credit for taxes paid pursuant to sales tax returns when the tax was properly reportable on motor fuel tax returns pursuant to Tax Law § 287.

FINDINGS OF FACT

Petitioner, Schultis Service Station, Inc. ("Schultis"), operated a filling station and repair shop at 277 West Sunrise Highway, Freeport, New York during the period in issue, January 1982 through February 1986. Schultis made retail sales of diesel fuel and kerosene but never registered as a distributor with the Department of Taxation and Finance.

As a result of a field audit of Schultis' books and records for the period January 1982 through February 1986, a Notice of Determination of Tax Due was issued to Schultis on April 17, 1986 which set forth motor fuel tax due of $76,294.60, penalty of $14,064.61 and interest of $6,028.27, for a total amount due of $96,387.48. The issuance of the notice of determination on April 17, 1986 followed two proposed audit adjustmentsissued to petitioner on October 25, 1985 which indicated an additional diesel tax on unreported purchases for the period January 1982 through December 1984 in the sum of $27,190.20 and additional diesel tax for the period January 1985 through October 1985 in the sum of $5,704.20.

After reviewing petitioner's records, including receipts for diesel motor fuel purchases, the general ledger, and the cash disbursement book, the auditor made a determination that the records were adequate and sufficient to determine petitioner's diesel tax liability for the entire audit period, January 1982 through February 1986. An audit method election form was executed by petitioner and the auditor, setting forth that any audit method chosen would utilize all of the records to determine the diesel motor fuel tax liability.

On audit of diesel motor fuel purchases gleaned from actual receipts and purchase invoices, the auditor determined that petitioner purchased 363,999 gallons of diesel motor fuel during the period January 1982 through February 1986. As stated earlier, no diesel motor fuel tax returns were filed or diesel tax paid on said purchases.

With regard to the audit of kerosene purchases by petitioner and sales to petitioner by its chief supplier, Score Oil of Island Park, New York, the auditor discovered that no records existed for the years 1983, 1985 and 1986. Therefore, estimates had to be made based upon purchase invoices and the disbursements journal maintained by petitioner for the years 1982 and 1984. Sales figures were received from petitioner's chief source of kerosene, Score Oil; however, Score Oil's records were not deemed to be complete since on at least one occasion petitioner reported purchases of kerosene far in excess of the amount Score Oil said it sold to petitioner. More specifically, for the month of March 1984, petitioner's records indicated purchases of kerosene in the amount of 13,000 gallons while Score Oil indicated only 3,500 gallons of kerosene sold to petitioner.

Kerosene purchases per petitioner's own records were used to determine the number of gallons purchased for most of the year 1982 and 1984 while estimates were made for May, June and July 1982, all of the year 1983, the month of August 1984, the entire year 1985, and

January and February of 1986. The estimates were made using historical figures from the years for which purchase figures were available, i.e. the years 1982 and 1984. The auditor used the months of January, February, and March 1982 to determine an average number of gallons purchased during the winter months of November, December, January, February and March, of 15,000 gallons. For all other months except April, the auditor determined an average of 2,000 gallons while April was accorded 3,000 gallons based upon a higher historical usage in that month.

Utilizing actual purchase figures and estimates, it was determined that petitioner purchased 398,947 gallons of kerosene. When this figure was added to the total number of gallons of diesel motor fuel purchased, 363,999 gallons, it yielded 762,946 gallons of motor fuel purchased by petitioner during the audit period but on which no motor fuel tax was paid. When the total number of gallons was multiplied by the 10¢ per gallon tax rate, it yielded the amount of tax set forth on the notice of determination, $76,294.60 (Finding of Fact "2").

The only sales tax return entered into evidence was the quarterly sales tax return for the period June 1, 1984 through August 31, 1984 submitted by the Division of Taxation. Although petitioner indicated it would submit evidence of payment of taxes after the hearing, no such proof was ever received.

SUMMARY OF PETITIONER'S POSITION

Petitioner contends that tax was remitted for the diesel fuel it sold but said tax was reported on and remitted with its quarterly sales tax returns. Therefore, petitioner wishes to be given a credit for said payments. Additionally, petitioner argues that the kerosene and some of its diesel fuel were sold for off-highway and home heating purposes and therefore were not

subject to the full diesel tax.

Finally, petitioner argues that, in any event, the estimates made by the Division of Taxation were excessive in light of the gallonage reflected on Score Oil's records.

CONCLUSIONS OF LAW

A. Given the definition of the term "motor fuel" and "distributor of diesel motor fuel" contained in Tax Law § 282-a and the regulation at 20 NYCRR 420.1, 420.2 it is clear that petitioner was a distributor of diesel motor fuel and motor fuel during the period January 1982 through February 1986 as a person who makes retail sales of diesel motor fuel in New York, where the term diesel motor fuel includes kerosene for use in a diesel engine.

B. Pursuant to Tax Law §§ 282-a and 283, petitioner was required to register with the Department of Taxation and Finance as a motor fuel distributor.

Further, Tax Law §§ 282-a and 287 provide that distributors shall file with the Department of Taxation and Finance a return stating the number of gallons of motor fuel sold by such distributor within the State during the preceding calendar month or for such period as the former State Tax Commission deemed appropriate.

The record demonstrates that petitioner neither registered as a motor fuel distributor with the Department of Taxation and Finance nor did it file returns as prescribed by Tax Law §§ 282-a and 287. Throughout the audit period, petitioner sold motor fuel and diesel motor fuel in contravention of the Tax Law.

Although petitioner asserted that it included its diesel fuel sales in its quarterly sales tax returns and remitted tax on same, it did not produce any evidence of such conduct. Without substantiation of payment of the diesel motor fuel tax no credit can be granted.

C. Pursuant to Tax Law § 286 and the regulation at 20 NYCRR 420.8, distributors of diesel motor fuel, such as petitioner, are required to keep a complete and accurate record of all purchases and sales or other dispositions of motor fuel (see, Petroleum Sales and Surface, Inc. v. Bouchard, 98 AD2d 882, affd 64 NY2d 671).

Thus petitioner has the burden to establish its compliance with the statutory requirement of keeping an accurate record of all its purchases and sales or other distributions of motor fuel. Petitioner has not met said burden. (See, Petroleum Sales and Service v. Bouchard, supra).

D. Petitioner offered no evidence to show that the Division of Taxation improperly assessed tax against it. Most notably, petitioner produced no records of nontaxable diesel fuel sales or purchases. It also did not provide any evidence that the kerosene it sold was used for anything other than motor fuel purposes. Therefore, the Division of Taxation's conclusion that all dispositions of diesel motor fuel and kerosene were taxable was reasonable.

Further, petitioner has not established that the Division's assessment was erroneous or improper. Its assessment was derived from petitioner's own records and those of its chief supplier of motor fuel. This, in conjunction with petitioner's failure to produce any evidence to the contrary, is fatal to petitioner's claims that the assessment was improper or erroneous. For these reasons, the assessment must be sustained.

E. The petition of Schultis Service Station, Inc. is denied and the notice of determination issued April 17, 1986 is sustained together with such penalty and interest as may be lawfully

owing.

DATED: Troy, New York

June 29, 1989

/s/ Joseph W. Pinto, Jr.

ADMINISTRATIVE LAW JUDGE