

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FOURTH DAY ENTERPRISES, INC. : 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 June 2, 1983 :
through May 30, 1985. :

Petitioner, Fourth Day Enterprises, Inc., 36 Crescent Hill Road, Pittsford, New York 14534, 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 June 2, 1983 through May 30, 1985 (File No. 803782).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 259 Monroe Avenue, Rochester, New York on November 30, 1987. Petitioner appeared by Nelson P. Maracle, C.P.A. The Audit Division appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether the Audit Division's denial of petitioner's claim for refund of sales tax paid to its supplier of gasoline for the period in question was proper.

FINDINGS OF FACT

1. Petitioner operates a service station which sold gasoline at retail. During the period in issue, petitioner purchased gasoline from its supplier and paid sales tax to its supplier on such purchases based on the regional average sales prices for gasoline. Thereafter, petitioner sold the gasoline to its retail customers at a price lower than the regional average retail sales price.

2. On or about April 17, 1986 petitioner, Fourth Day Enterprises, Inc., filed three applications for credit or refund of state and local sales or use tax as follows:

<u>PERIOD</u>	<u>REFUND CLAIMED</u>
June 2, 1983 - December 31, 1983	\$
2,328.25	
January 2, 1984 - December 30, 1984	
15,120.57	
January 2, 1985 - May 30, 1985	
4,424.24	

3. In conjunction with its applications for refund of sales tax, petitioner submitted a schedule which showed the sales tax due and the sales tax paid to petitioner's supplier. The amount of sales tax was apparently based on the combined New York State and Monroe County tax rate. Petitioner's refund claim was premised upon the assertion that the tax payments to the supplier exceeded the amount of tax which would be due if computed on petitioner's actual retail sales.

4. By a letter dated May 2, 1986, the Audit Division denied petitioner's applications for refund, taking the position that the Tax Law does not allow a refund under the circumstances presented.

CONCLUSIONS OF LAW

A. That Tax Law § 1111(d) authorized the State Tax Commission to prescribe and amend schedules determining the amount of sales tax to be collected by a distributor for each gallon of gasoline sold. Tax Law § 1111(e), as in effect during the period in question provided, inter alia, that the retail sales tax imposed by Tax Law § 1105(a) was, with respect to automotive fuel, to be based on the regional average retail sales price and collected in accordance with the noted Tax Law § 1111(d) schedules. Here, petitioner's distributor collected tax upon its delivery of gasoline to petitioner. Petitioner then sold the gasoline to its customers at a price lower than the regional average retail sales price.

B. That in 1985 the Legislature recognized that the amount of tax paid by the retail vendor might exceed the amount of tax required to be collected (1985 NY Legis Ann, at 55). Therefore, it enacted the provisions set forth in Tax Law § 1120 to apply for refunds or credits with respect

to motor fuel (L 1985, ch 44, § 26). To the extent at issue herein, this section allows a vendor required to collect sales tax a refund or credit for the pre-collected tax included in his selling price. The refund is allowed to the extent the tax paid by or passed through to the retail vendor exceeds the amount of tax required to be collected or required to be remitted pursuant to the provisions of Articles 28 and 29 of the Tax Law (Tax Law § 1120[f]).

C. That section 42 of Chapter 44 of the Laws of 1985 set forth the effective date of the foregoing enactment as follows:

"§ 42. This act shall take effect immediately, except that sections one through thirty-six shall take effect June first, nineteen hundred eighty-five and shall apply to all taxable events respecting motor fuel as such events are defined in section eleven hundred two of the tax law, as amended by this act, and automotive fuel occurring on and after such date and an amount equivalent to the sales taxes paid by or passed through to a purchaser upon sales of motor fuel before such date at the regional average retail sales price pursuant to the provisions of articles twenty-eight and twenty-nine of the tax law in effect prior to such date shall be allowed such purchaser as a credit or refund, where a refund or credit would be allowable after such date under the tax law, as amended by this act, against the tax required to be prepaid pursuant to section eleven hundred two and passed through or required to be collected or paid pursuant to section eleven hundred five or eleven hundred ten of the tax law upon sales or uses of such motor fuel occurring on and after such date and provided further, however, that no refund or credit shall be allowed pursuant to this provision with respect to motor fuel placed into the ordinary fuel tank connected with the engine of such vehicle prior to such date notwithstanding use of such fuel thereafter." (Emphasis added.)

D. That in view of the above-quoted language it is clear that an application for a credit or refund made after June 1, 1985 may pertain to sales tax paid by or passed through to a purchaser upon sales of motor fuel before June 1, 1985. Therefore, the Audit Division erred in concluding that there was no authority to consider petitioner's refund application.

E. That in reaching the foregoing conclusion, it is recognized that the provision for a refund or credit is remedial inasmuch as it provides a recourse to those who prepay sales tax

based upon a price which is greater than the price at which retailers of gasoline sell to their customers. As a remedial statute, it is not subject to the general rule that statutes are not given a retroactive effect (McKinney's Cons Laws of NY, Book 1, Statutes § 54[a]). It is also recognized that this determination declines to follow Matter of Russell Mayne Enterprises, Inc., State Tax Commn., January 16, 1987; Matter of James V. Johnson d/b/a Jim's Hess Service, State Tax Commn., December 23, 1986; and Matter of Casco Service Station, Inc., State Tax Commn., December 23, 1986 to the extent that said decisions are inconsistent with section 42 of Chapter 44 of the Laws of 1985.

F. That the petition of Fourth Day Enterprises, Inc. is granted to the extent that the Audit Division is directed to consider petitioner's refund application on the merits in a manner not inconsistent herewith.

DATED: Albany, New York
February 5, 1988

ADMINISTRATIVE LAW JUDGE