STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
M.W.S. 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 February 1, 1983 through June 30, 1985.	:	

Petitioner, M.W.S. Enterprises, Inc., 5701 Transit Road, East Amherst, New York 14051, 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 February 1, 1983 through June 30, 1985 (File No. 804307).

On March 5, 1991 and March 13, 1991, respectively, petitioner, by its representative Leonard G. Tilney, Jr., Esq., and the Division of Taxation by William F. Collins, Esq. (Deborah Dwyer, Esq., of counsel) executed a consent agreeing to resolve the controversy upon submission of documents without a hearing. After due consideration of the record, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether chapter 44 of the Laws of 1985 authorizes a refund of sales tax paid on the purchase of motor fuel by a service station operation from a distributor during the period February 1, 1983 through June 30, 1985, to the extent that such tax exceeds the amount that would be due if the tax were calculated based on the price at which the service station sold the motor fuel.

II. Whether chapters 454 and 469 of the Laws of 1982 violate the equal protection provisions of the State and Federal constitutions.

III. Whether chapters 454 and 469 of the Laws of 1982 permit an unjust taking of property without just compensation in violation of the due process and eminent domain provisions of the

State and Federal constitutions.

FINDINGS OF FACT

Petitioner, M.W.S. Enterprises, Inc., and the Division of Taxation ("Division") entered into a stipulation of facts which has been substantially incorporated into this determination.

Petitioner operates a retail convenience store and gasoline service station called Arco AM-PM Minimart located at 680 Center Street, Lewiston, New York. Petitioner's supplier is Atlantic Richfield Tonawanda Terminal. During the period February 1, 1983 through June 30, 1985, petitioner paid sales tax on its purchases of gasoline from its supplier based on the regional (region 9) average sales price for gasoline. Petitioner then sold the gasoline to its retail customers at a price lower than the regional average retail sales price.

On or about March 10, 1986, petitioner filed an application for credit or refund of state and local sales taxes on gasoline in the amount of $13,564.01. Petitioner's claim was premised on the assertion that tax payments to its gasoline supplier exceeded the tax that would be due if computed on petitioner's actual retail sales prices to its customers.[1]

By a letter dated April 15, 1986, the Division denied petitioner's application for refund, taking the position that the Tax Law does not provide for a refund under the circumstances presented here.

A conciliation conference was held on June 2, 1987. Based on information provided by petitioner, the Division verified that petitioner accurately calculated the amount of the refund due if it prevails on the legal issues.

CONCLUSIONS OF LAW

A. Prior to September 1, 1982, sales tax on motor fuel was imposed on and required to be collected on each gallon of gasoline sold at retail service stations (Tax Law § 1111[former

[1]Petitioner's refund application included the period June 1, 1985 through June 30, 1985. A schedule attached to the application shows that sales tax collected by petitioner on the retail selling price of gasoline exceeded sales tax prepaid to its supplier in that period.

(d), (e)]). The tax rate was applied to the service station's actual selling price, and each individual station was required to collect and remit the tax.

Beginning September 1, 1982 (L 1982, chs 454 and 469) and during most of the period in issue here, the retail sales tax on motor fuel was collected on sales by distributors to non-distributors. Thus, petitioner was required to pay sales tax on its purchases of gasoline from its supplier, Atlantic Richfield. The sale from Atlantic Richfield to petitioner constituted a retail sale. Tax Law § 1101(b)(4)(former [ii]) provided "a sale of automotive fuel [including motor fuel] by a distributor is deemed to be a retail sale." The tax was thus generally imposed at a higher point in the distribution chain than the point of sale by the service station to its customer. The rate of tax was the same as under prior law, but the price to which it applied was not the actual selling price. For part of the period at issue, the tax was calculated on a statewide average retail markup (Tax Law § 1111[e][former (2)], as amended by L 1982, ch 454); for the remainder of the period, beginning March 1, 1983, it was calculated on a regional average retail sales price (Tax Law § 1111[e][former (2)], as amended by L 1982, ch 930). In either event, the tax collected by the distributor was included in the cost to the service station and passed through to the ultimate consumer (Tax Law § 1111[e] [former (4)]). The price shown on the pump was to include the tax so paid (see, Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).

No refund or credit was provided to a service station based on the differential between its actual selling price at the pump and the average regional sales price, because the service station was not required or authorized to collect sales tax on the actual selling price, but was expected to include the sales tax it paid to its distributor in its pump price. Under former section 1111, subparagraphs (d) and (e), the sales tax was paid by the distributor, and the entire amount of the tax was passed through to the service station and then to the consumer.

Chapter 44 of the Laws of 1985, generally effective June 1, 1985, substantially revised the system for collection of the sales tax on motor fuel and introduced a new concept, i.e., a prepaid sales tax. As added by chapter 44 of the Laws of 1985, section 1102(a) of the Tax Law

provided:

> "Every distributor shall prepay, on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, a tax on each gallon of motor fuel (i) which he imports or causes to be imported into this state for use, distribution, storage or sale in the state or produces, refines, manufacturers or compounds in this state or (ii) if the tax has not been imposed prior to its sale in this state, which he sells...." (Emphasis added.)

Chapter 44 divided the state into two regions for purposes of the imposition of the tax: a downstate region consisting of the Metropolitan Commuter Transportation District and an upstate region consisting of the remainder of the State (see, Tax Law § 1111[e][1], as added by L 1985, ch 44, § 22). The prepaid tax was imposed at the rate of 7% upon the regional average retail sales price established by the Energy Commissioner for the downstate region and at the rate of 6% upon the regional average retail sales price established by such Commissioner for the upstate region (Tax Law § 1111[e][2], as amended L 1985, ch 44, § 22).

Section 18 of chapter 44 of the Laws of 1985 amended section 1101(b)(4)(ii) to delete the special definition of "retail sale" that had deemed the sale of automotive fuel by a distributor to be a retail sale. Accordingly, on and after June 1, 1985, service stations were required to collect the tax imposed by section 1105 upon their sales of motor fuel to consumers based upon the combined state and local sales tax rate in effect in the particular locality and the actual sales price.

Tax Law § 1101(b)(4)(ii), as amended by chapter 44 of the Laws of 1985, provided that the prepaid tax was to be passed through on purchases as follows:

> "no motor fuel shall be sold in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid...."

Pursuant to Tax Law § 1120(a)(1), as added by section 26 of chapter 44 of the Laws of 1985, a service station was allowed a refund or credit for the prepaid sales tax thus included in its cost against the retail sales tax which it was required to collect on and after June 1, 1985, as follows:

> "A vendor of motor fuel who or which is required to collect the taxes imposed by subdivision (a) of section eleven hundred five of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter shall be allowed a refund or credit against the amount of tax collected and required to be

> remitted to the tax commission pursuant to the provisions of section eleven, hundred thirty-seven of this article upon the retail sale of motor fuel in the amount of the tax on such motor fuel prepaid by or passed through to and included in the price paid by such vendor pursuant to the provisions of section eleven hundred two of this article." (Emphasis added.)

This provision was designed to allow a credit or refund depending on whether the tax actually collected by the retail service station on the sale of motor fuel was more or less than the prepaid tax included in its purchase price from the distributor.

Section 42 of chapter 44 of the Laws of 1985, which stated the effective date of the act, also addressed the transition from the old system to the new system of tax collection. The Legislature recognized that vendors would have in their inventory on June 1, 1985 motor fuel upon which the tax would have been paid under the former system of tax collection and upon which the tax would be imposed under section 1105 of the Tax Law upon a sale to a consumer. To prevent the tax from being imposed more than once with respect to such motor fuel, section 42 provided as follows:

> "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.)

B. The issues raised by petitioner are almost identical to those raised by the petitioner in Matter of Fourth Day Enterprises (Tax Appeals Tribunal, October 27, 1988). Petitioner argues that the 1985 amendments were remedial in nature and, therefore, that the refund and credit provisions of section 42 should be applied retroactively to sales tax it paid in the period February 1, 1983 through June 30, 1985. In Fourth Day the Tax Appeals Tribunal held that

chapter 44 of the Laws of 1985 changed the entire system of tax collection and that, in the absence of explicit legislative intent to the contrary, the 1985 amendments would not be interpreted to be remedial statutes. The petitioner in Fourth Day argued, as does petitioner here, that Chapters 454 and 469 of the Laws of 1982 violate the equal protection provisions of the State and Federal constitutions. The Tribunal found that the equal protection argument constituted a constitutional challenge to the statute as written and not merely a challenge to the Division's interpretation or application of the statute, and it held that the Tribunal does not have jurisdiction to consider such constitutional challenges. The Tribunal's decision in Fourth Day is thus determinative of two of the three issues raised by petitioner.

Petitioner's third argument is that chapters 454 and 469 of the Laws of 1982 were so arbitrary and unequal in application that they resulted in the arbitrary taking of property without just compensation. This argument presumes that the statute precluded petitioner, and other similarly situated retailers, from recouping from its customers the actual amount of the tax it paid to its distributors. This was not the case. The tax was imposed on the sale from the distributor to the retailer. The statute anticipated that the retailer would pass through the tax amount to its customers. The statute did not require or authorize petitioner to collect sales tax from its customers based on its actual retail selling price.

C. The petition of M.W.S. Enterprises, Inc. is denied.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE