STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **SOTS LEASING CORP.** | : | DETERMINATION: DTA NO. 818428 |
| for Revision of a Determination or for Refund of Fuel Use Tax under Article 21-A of the Tax Law for the Period July 1, 1996 through March 31, 1999. | : | |

Petitioner, Sots Leasing Corp., 1741 Richmond Terrace, Staten Island, New York 10310, filed a petition for revision of a determination or for refund of fuel use tax under Article 21-A of the Tax Law for the period July 1, 1996 through March 31, 1999.

A hearing was held before, Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on December 20, 2001 at 11:15 A.M, with all briefs to be submitted by March 29, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by its officer, Michael Scerbo. The Division of Taxation appeared by Barbara G. Billet, Esq. (Todd M. Kerner, Esq., of counsel).

## *ISSUES*

I. Whether petitioner has established entitlement to a reduction of fuel use taxes determined due by the Division of Taxation.

II. Whether penalty imposed against petitioner should be abated.

## *FINDINGS OF FACT*

1. Petitioner is a family-run trucking company that operated three trucks during the audit period. In business since 1978, its primary customer during the audit period was the electronics company, Casio, Inc. Describing its trucking services for Casio as "straight job work" or "less than truck load freight," petitioner transported goods from Casio's main location in Dover, New Jersey and its satellite warehouses in Clark, New Jersey and in Brooklyn, New York to "multiple delivery points" throughout the New York City metropolitan area, including retail outlets and the warehouses for the Caldor and Bradlees chain stores. Petitioner also performed "tractor trailer work" involving the pick-up and disposal of asbestos waste at a disposal site in Morrisville, in the western part of Pennsylvania. The word "Sots" in petitioner's corporate name is a shortening of its original name, Sotsebsa, which is the word asbestos spelled backwards.

2. On its Application for Highway Use and/or Automotive Fuel Carrier Permits 15th Series (Valid 1/1/94 through 12/31/96), which was dated June 21, 1994 and signed by Michael Scerbo in his capacity as petitioner's vice president, permits were requested (and in the regular course granted) for the following three diesel powered vehicles:

| Manufacturer's serial number | Vehicle type | Make of vehicle | Year | Unloaded weight of vehicle | Gross weight of vehicle |
|---|---|---|---|---|---|
| 1XKED29XOFJ366862 | Tractor | Kenworth | '85 | 13,000 | 80,000 |
| 1XKED29X5FJ363018 | Tractor | Kenworth | '85 | 13,000 | 80,000 |
| 1HTLDTVN2KH651399 | Truck | International | '89 | 26,000 | 32,800 |

On its Renewal Application for Highway Use and/or Automotive Fuel Carrier Permits 16th Series, which was dated October 15, 1996 and signed by Mr. Scerbo in his capacity as petitioner's vice president, the same three vehicles shown above were listed. On this renewal application, the unloaded weight for the International truck of 26,000 which was typed on the

form was crossed out and an unloaded weight of 13,500 was handwritten in. However, the gross weight of this truck remained 32,800 on the renewal application. Further, on petitioner's New York State International Fuel Tax Agreement (IFTA) License Renewal Application dated February 9, 1999 and signed by Mr. Scerbo in his capacity as petitioner's vice president, the number of IFTA vehicles was shown as three. On the vehicle registrations with the New York and New Jersey Departments of Motor Vehicles, the weight for the International truck was shown as 26,000.

3. The record includes photocopies of petitioner's highway use tax returns (forms MT-903) for the five quarters in the period April 1, 1997 through June 30, 1998 which were signed either by petitioner's office manager, Teresa Scerbo, or an individual with the name of Susan Graziano,[1] who was also described as office manager on the two returns she signed. None of these five returns reported any New York miles, with the box checked off on the returns which claimed: "All miles reported by another (leased motor vehicles)." These five quarterly returns appear to have been timely filed. The record also includes photocopies of petitioner's highway use tax returns for the three quarters in the period July 1, 1998 through March 31, 1999, which were signed by Mr. Scerbo. These returns show New York miles of 2,225, 3,265, and 2,353, respectively, for the three quarters ended September 30, 1998, December 31, 1998, and March 31, 1999. The returns for the quarters ended September 30, 1998 and December 31, 1998 have a date stamped received by the Division of November 2, 1999, and the return for the quarter ended March 31, 1999 was dated July 31, 1999 by Mr. Scerbo. A memo dated June 25, 1999 in the audit report stated that "Returns from 1996 forward have been filed for IFTA [International Fuel Tax Agreement] showing no mileage/fuel consumed."

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[1] "Susan Graziano" is a best guess for the signature on the returns which is somewhat difficult to decipher.

4. The Division of Taxation ("Division") issued a Notice of Determination dated September 21, 2000 against petitioner asserting fuel use (IFTA) tax due of $4,138.00, plus interest and penalty. The Division's auditor examined all of petitioner's receipts from its purchases of diesel fuel as well as all of its mileage records and drivers' logs for the three trucks it operated during the audit period. Based upon this review, the auditor calculated the following IFTA miles, total diesel gallons consumed, and tax due during the audit period on an Audited Return Summary Information schedule included in the audit file, which was attached to the Division's Proposed Audit Adjustment of Tax Due under Article 21A of the Tax Law dated February 15, 2000,[2] a date seven months prior to the Notice of Determination, as follows:

| Quarter/ Year | Total IFTA Miles | Avg MPG | Total Gallons | Fuel Use Tax Due |
|---|---|---|---|---|
| 3 1996 | 11,416 | 4.00 | 2,854.0 | $455.44 |
| 4 1996 | 9,653 | 4.00 | 2,413.0 | 204.03 |
| 1 1997 | 10,242 | 4.00 | 2,560.0 | 293.58 |
| 2 1997 | 15,186 | 4.00 | 3,796.0 | 1,016.44 |
| 3 1997 | 13,828 | 4.00 | 3,457.0 | 828.10 |
| 4 1997 | 14,834 | 4.00 | 3,708.0 | 678.46 |
| 1 1998 | 10,604 | 4.00 | 2,651.0 | 341.08 |
| 2 1998 | 11,351 | 4.00 | 2,837.0 | 425.56 |
| 3 1998 | 15,773 | 4.00 | 3,943.0 | 326.03 |
| 4 1998 | 18,450 | 4.00 | 4,613.0 | 571.66 |
| 1 1999 | 14,471 | 5.30[3] | 2,731.0 | 217.95 |

[2] This schedule included credit amounts for the first half of the year 1996, which is not at issue. Consequently, such amounts have been backed out of the itemization shown above.

[3] On petitioner's IFTA Quarterly Fuel Use Tax Schedule for the period January 1, 1999 through March 31, 1999, petitioner reported total miles of 16,242, consisting of New York miles of 2,353, New Jersey miles of 8,013 and Pennsylvania miles of 5,876. It also reported total gallons of 2,324 and an average fleet MPG of 6.99.

| | | | | |
|---|---|---|---|---|
| Totals | 145,808 | | 35,563.0 | $5,358.33 |

It appears that the auditor reviewed further documentation, notably additional tax paid receipts for the purchase of diesel fuel, which were provided by petitioner in the period between the issuance of the Notice of Determination dated September 21, 2000 and the earlier Proposed Audit Adjustment dated February 15, 2000, resulting in a decrease in the fuel use tax shown due in the above schedule. The Notice of Determination dated September 21, 2000, in contrast to the higher quarterly amounts in the schedule attached to the Proposed Audit Adjustment, asserted total fuel use tax due of $4,138.00, as compared to the $5,358.33 shown above, as follows:

| Tax Period Ended | Fuel Use Tax Asserted in Proposed Audit Adjustment | Fuel Use Tax Asserted in Notice of Determination |
|---|---|---|
| 9/30/96 | $ 455.44 | $316.45 |
| 12/31/96 | 204.03 | 104.35 |
| 3/31/97 | 293.58 | 202.35 |
| 6/30/97 | 1,016.44 | 862.48 |
| 9/30/97 | 828.10 | 644.63 |
| 12/31/97 | 678.46 | 530.05 |
| 3/31/98 | 341.08 | 272.86 |
| 6/30/98 | 425.56 | 348.81 |
| 9/30/98 | 326.03 | 189.28 |
| 12/31/98 | 571.66 | 486.82 |
| 3/31/99 | 217.95 | 179.92 |
| Totals | $5,358.33 | $4,138.00 |

5. The record includes details concerning the auditor's calculation of (i) petitioner's taxable IFTA miles, (ii) the allocation of fuel use tax among the three states in which petitioner operated its trucks based upon an allocation of petitioner's taxable IFTA miles among the three

states, and (iii) the amount of taxable gallons of diesel based upon the taxable IFTA miles, with a credit for gallons on which petitioner offered proof to the auditor of tax paid gallons. For example, the quarterly period in which the auditor determined the largest amount of fuel use tax due is the second quarter of 1997, i.e., the period ended June 30, 1997. For this quarter, the auditor computed fuel use tax due of $862.48 based upon the following detailed calculation:

| | Taxable IFTA miles | Taxable Gallons | Tax Paid Gallons | Net Taxable Gallons | Tax Rate | Tax |
|---|---|---|---|---|---|---|
| New Jersey | 7,356 | 1,839 | 215 | 1,624 | 0.1750 | 284.20 |
| New York | 5,508 | 1,377 | 93 | 1,284 | 0.3183 | 408.70 |
| Pennsylvania | 2,322 | 581 | 38 | 543 | 0.2481 | 169.58[4] |
| Totals | 15,186 | 3,797 | 346 | 3,451 | | 862.48 |

6. In calculating taxable IFTA miles as shown above, the auditor analyzed the mileage records from drivers' logs and fuel receipts provided by petitioner. She utilized special software known as Rand McNally Mile Maker to calculate miles driven based upon locations listed in the drivers' logs. She noted that petitioner did not provide her with any routes or odometer readings. Nonetheless, the auditor prepared approximately 90 pages of schedules of mileage, which provided a detailed breakdown of the mileage of petitioner's three vehicles in the three states of New York, New Jersey and Pennsylvania based upon the information that was available. The auditor also determined that petitioner's records were insufficient to calculate the miles per gallon of its three vehicles because its fuel receipts often did not indicate gallons purchased or lacked the identification number for the vehicle being fueled. Consequently, she relied on Tax

[4]The Pennsylvania tax includes a basic tax at the 0.2481 rate of $134.72 plus a Pennsylvania surcharge amount of $34.86.

Law § 523[5] and used a rate of four miles per gallon. For example, the New York taxable IFTA miles shown above of 5,508 miles for the quarter ending June 30, 1997 divided by 4 equals the taxable gallons shown of 1,377 calculated by the auditor. Petitioner did not maintain any bulk storage facilities for fuel and purchased all fuel used by its vehicle on a retail basis.

***SUMMARY OF THE PARTIES' POSITIONS***

7. The Division maintains that petitioner has been given credit for all tax paid purchases of diesel fuel during the audit period which petitioner was able to substantiate with an acceptable receipt or invoice. It also contends that the International truck used by petitioner during the audit period was a "qualified motor vehicle" for purposes of the fuel use tax. The Division points out that "Petitioner's application for highway use tax permits . . . and Petitioner's highway use tax returns . . . listed the gross weight of such truck at either 32,500 or 32,800 pounds" (Division's letter brief, p. 2). According to the Division, the auditor also properly used four miles per gallon in her calculation of tax due because petitioner's records were inadequate or incomplete. Finally, the Division contends that petitioner has not shown reasonable cause to abate penalties.

8. Petitioner maintains that it used the same vehicles in a period subsequent to the audit period, and its fuel mileage was better than what was used by the auditor: 5.53 to nearly 7 miles per gallon instead of the 4 miles per gallon used by the auditor. Petitioner also contends that it was "forthcoming" and therefore penalties should be abated since Mr. Scerbo who was responsible for tax filings was ill during the audit period and was unable to file or monitor the filing of returns. Petitioner also questions the mileage between certain points used by the

[5] Tax Law § 523 provides that "Where the records of any carrier are inadequate or incomplete, the qualified motor vehicles of a carrier filing returns shall be deemed to have consumed, on the average, one gallon of diesel motor fuel for every four miles traveled. . . ."

auditor. Mr. Scerbo testified that the distance between Staten Island and Dover, New Jersey, for example, was much less than the mileage used by the auditor.

***CONCLUSIONS OF LAW***

A. Article 21-A of the Tax Law imposes a highway use tax known as the fuel use tax for the privilege of operating on the public highways of New York a "qualified motor vehicle" which is defined, in relevant part, as "Having two axles and a gross vehicle weight or registered gross vehicle weight exceeding twenty-six thousand pounds" (Tax Law § 521[b][1][i]).

B. Pursuant to Tax Law § 528(b), the Division has exercised its authority to enter into a cooperative agreement known as the International Fuel Tax Agreement (IFTA) for the collection of fuel use taxes and for the reporting and payment of tax to a single base state and a proportional sharing of revenue from such taxes among the jurisdictions where a "qualified motor vehicle" is operated. In this instance, petitioner is based in New York, and consequently the Division was responsible, as a participant in the IFTA, to audit petitioner's mileage and fuel use in New York, New Jersey and Pennsylvania, the three states where petitioner operated the three vehicles at issue.

C. As noted in Finding of Fact "3", petitioner wrongly filed highway use tax returns which incorrectly reported that it leased motor vehicles and consequently had no highway use tax liability. Further as noted in Finding of Fact "3", it filed IFTA returns which incorrectly showed no mileage or fuel consumed. In addition, petitioner ignored the record-keeping requirements of the IFTA. For example, section R700 of the IFTA Articles of Agreement provides that every licensee must maintain records to substantiate information reported on the IFTA returns as set forth in the IFTA Procedures manual. Section P550 of the IFTA Procedures Manual requires a carrier to maintain complete records of all fuel purchased. Section P560 of the

Procedures Manual provides that for a carrier to receive credit for tax paid purchases such purchases must be supported by an acceptable receipt or invoice. Section P560.300 of the Procedures Manual provides that an acceptable receipt must include the following: date of purchase, seller's name and address, number of gallons purchased, fuel type, price per gallon, unit numbers, and purchaser's name.

D. As noted in Finding of Fact "4", the auditor faced a difficult task in reconstructing petitioner's purchases of diesel fuel during the audit period in light of its failure to comply with the above record-keeping requirements. Nonetheless, the auditor properly determined the amount of fuel use tax due from the information available pursuant to the authority provided under Tax Law § 510.[6] The auditor's calculation was clearly reasonable based upon what was known by her at the time the Notice of Determination was issued (***see, Matter of Queens Discount Appliances, Inc.***, Tax Appeals Tribunal, December 30, 1993).

E. Petitioner did not offer any evidence at hearing that would justify the allowance of any additional tax paid receipts during the audit period for the purchase of diesel fuel. Furthermore, the International truck was properly included in petitioner's fuel use tax audit as a "qualified motor vehicle" since the record includes evidence that its gross vehicle weight exceeded 26,000 pounds as required by Tax Law § 521(b)(i). Petitioner's claim that because this truck was registered with the Department of Motor Vehicles as weighing exactly 26,000 pounds it was not a "qualified motor vehicle" is rejected. Petitioner ignores the fact that it made numerous filings with the Division stating that the truck in question had a gross weight of 32,500 or 32,800

[6] Tax Law § 528 makes section 510 of the Highway Use Tax, Article 21,applicable to the provisions of the Fuel Use Tax, Article 21-A. Section 510 provides that "In case any return filed . . . shall be insufficient or unsatisfactory . . . the commissioner . . . shall determine the amount of tax due from such information as is available to the commissioner."

pounds as noted in Finding of Fact "2". Petitioner failed to provide an explanation for this inconsistency and did not offer any evidence to support the lesser weight claimed on the Department of Motor Vehicles registrations.

F. Similarly, petitioner's claim that the auditor used incorrect mileage between certain points was not supported by adequate proof. As noted in Finding of Fact "6", the auditor analyzed the mileage records from driver's logs provided by petitioner and utilized special software known as Rand McNally Mile Maker to calculate miles driven based upon locations listed in the driver's logs. Her analysis was detailed in some 90 pages of schedules. A mere conclusory statement by Mr. Scerbo that the distance between Staten Island and Dover, New Jersey, Casio's warehouse, was less than the mileage used by the auditor was inadequate to meet petitioner's burden of showing error in the auditor's detailed analysis. This is especially so in light of petitioner's failure to provide any routes or odometer readings and the potential for multiple delivery stops between two geographic points, which would provide one explanation for the auditor's higher estimate of the mileage between such two points.

G. As noted in Finding of Fact "3", petitioner's IFTA returns showed no mileage/fuel consumed, and as noted in Finding of Fact "6", its fuel receipts often did not indicate gallons purchased or identify the particular vehicle being fueled. Consequently, the auditor properly relied on Tax Law § 523, as detailed in Footnote "5", and used a miles-per-gallon rate of four. Petitioner cannot rely on what it claims were the miles per gallon consumed by the three vehicles at issue in a period subsequent to the audit period. There are too many variables that could affect a variation in the number of miles driven per gallon, including the particular driver, route, maintenance of the vehicle, etc.

H. Pursuant to Tax Law § 527(b), penalty was properly imposed against petitioner for "failing to file a return or to pay any tax within the time required. . . . " Petitioner has not established that its failure to pay fuel use tax "was due to reasonable cause and not due to willful neglect." In the words of the Tax Appeals Tribunal, in establishing reasonable cause, the taxpayer faces an "onerous task" (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

> By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citation omitted]" (***Matter of MCI Telecommunications Corp.***, Tax Appeals Tribunal, Janaury 16, 1992).

The ill-health of Mr. Scerbo, petitioner's officer, is an insufficient basis for abating penalties. In particular, petitioner was not in the business of leasing trucks and such representation on its returns was without any basis in fact and cannot be excused by Mr. Scerbo's ill-health.

I. The petition of Sots Leasing Corp. is denied, and the Notice of Determination dated September 21, 2000 is sustained.

DATED: Troy, New York
August 1, 2002

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE