

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of :

ON-SITE FUEL OIL CO., INC.

DECISION

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, 1976 :
through May 31, 1979.

Petitioner, On-Site Fuel Oil Co., Inc., 364 Maspeth Avenue, Brooklyn, New York 11211, 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, 1976 through May 31, 1979 (File No. 40418).

A hearing was commenced before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 20, 1986 at 1:15 P.M., continued on May 21, 1986 at 2:15 P.M. and concluded on September 8, 1986 at 1:15 P.M., with all briefs to be submitted by January 30, 1987. Petitioner appeared by Birnbaum and Birnbaum (Harris Birnbaum, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto and Michael J. Glannon, Esqs., of counsel).

ISSUES

I. Whether petitioner substantiated a payment of sales tax in the amount of \$13,431.12 for the tax period ended November 30, 1977.

II. Whether petitioner substantiated an adjusting entry in its general journal, reducing its tax liability by \$12,240.49.

III. Whether petitioner and the Audit Division entered into a stipulation on the record reducing petitioner's tax liability to a maximum of \$3,000.00.

FINDINGS OF FACT

1. On June 3, 1982, as the result of a field audit, the Audit Division issued to petitioner, On-Site Fuel Oil Co., Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1976 through November 30, 1979, asserting sales and use taxes due in the amount of \$19,729.91 plus penalty and interest. Petitioner had previously executed a series of consents which extended the period of limitation for assessment of sales and use taxes for the periods under consideration to June 20, 1982.

2. The notice referred to above assessed sales and use tax within each quarterly sales tax period as shown below. The amounts in parentheses represent credits.

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
11/30/77	\$13,431.12	\$3,357.78	\$7,375.16
02/28/78	3,248.13	812.03	1,687.46
05/31/78	12,634.18	3,158.54	6,181.52
08/31/78	(2,649.43)	-0-	(947.88)
02/28/79	1,279.12	319.78	511.03
05/31/79	(8,213.21)	-0-	(2,416.24)

3. The deficiency under consideration resulted from an audit of petitioner's actual books and records. Petitioner maintained a sales journal, a purchase journal and a general ledger. These were judged by the auditor to be incomplete and kept in poor condition. Other records made available during the audit were sales tax returns, State and Federal income tax returns, sales invoices, purchase invoices, resale certificates and exempt organization certificates.

4. An examination of fixed assets acquired during the audit period disclosed purchases of \$12,405.00 upon which petitioner failed to pay sales tax due of \$992.40. This amount is not in dispute.

5. A one month test period was selected to test petitioner's claimed nontaxable sales, and as a result, all nontaxable sales were accepted as reported.

6. Petitioner maintained a sales tax accrual account where it recorded sales taxes charged. In order to determine its taxable sales, petitioner capitalized the recorded sales taxes, i.e., divided them by the tax rate plus one. On audit of petitioner's books and records, it was determined that discrepancies existed between the total amounts recorded in the sales tax accrual account and the amounts reported on sales tax returns. These discrepancies consisted of overstatements as well as understatements of taxes purportedly collected. The assessment (or credit) in each quarterly period as shown on the notice (Finding of Fact "1", supra) represents the difference between the amount of sales tax collected as shown in the sales tax accrual account and the sales tax due as reported on petitioner's sales tax returns.

7. At hearing, the Audit Division conceded that petitioner had made a payment of \$13,431.12 for the period ended November 30, 1977, completely cancelling the assessment for that quarter.

8. The remaining disputed item involved the Audit Division's disallowance of an adjusting entry in petitioner's general ledger which, if accepted, would have reduced petitioner's tax liability in the amount of \$12,240.49 for the period ended May 31, 1978.

(a) Petitioner was a fuel oil distributor. One of its customers was a New York State corporation, Snowlift, Inc. ("Snowlift"), whose primary business activity involved snow removal. In the winter of 1977 and 1978, Snowlift had a contract with the Newark Airport in New Jersey for snow removal. During heavy snowstorms, Snowlift was required to work continuously to clear

air strips and parking lots. This in turn required petitioner to provide a steady supply of fuel for Snowlift's snow removal equipment. Petitioner's trucks were loaded with fuel at a staging area at Newark Airport and sent to a terminal where fuel would be pumped directly from the truck into Snowlift's equipment. When the truck was empty, it would return to the staging area to refuel. Certified delivery tickets were prepared as fuel was delivered. Snowlift received a copy of each ticket, and petitioner retained a copy. Within a week to ten days, petitioner prepared and sent an invoice to Snowlift.

(b) From December 15, 1977 through March 15, 1978, petitioner billed Snowlift for total sales in the amount of \$177,828.90, including sales tax. The invoice amounts were recorded as entries in the Snowlift sales account. The total was entered in the accounts receivable control account on a monthly basis. A separate monthly entry was made in the sales tax accrual account, representing the total amount of sales tax billed to Snowlift.

(c) For the period ended March 31, 1978, several adjustments were made to petitioner's books. One adjustment is pertinent to the issue under consideration. An adjusting entry of \$12,240.49 was made in the general ledger to adjust for sales tax erroneously billed to Snowlift on deliveries made by petitioner to the Newark airport. Corresponding adjusting entries were made in the accounts receivable control account and the sales tax accrual account. No entry was made on the Snowlift sales account, and no adjusting memorandum or invoice was prepared.

(d) Petitioner never collected the disputed amount of \$12,240.49 from Snowlift.

9. On May 21, 1986, at a hearing before the State Tax Commission, the parties entered into the following stipulation placed on the record:

"It is stipulated and agreed by and between the petitioner and the State Tax Commission [sic] that the petitioner shall have 30 days from today within which to submit... evidence showing that the State's claim of tax on certain deliveries of fuel has been made on fuel which was sold and delivered to the then Snowlift Company, now known as Hudson General Company, and delivered to the entity I just mentioned in Newark thereby removing any responsibility for New York State sales or use taxes. The evidence will be submitted in writing... within that 30 day period.

In the event that the 30 days go by and by the end of that time the petitioner is unable to submit such evidence..., the petitioner consents that the State Tax Commission shall be entitled to a tax in the sum of \$3,000.00 together with interest thereon...

Should the evidence be submitted within the time frame, namely of 30 days from today, and should the State Tax Commission [sic] reject the said evidence or question the validity or authenticity of the then said evidence, then in that event this matter may be sent down for a hearing before the hearing officer on short notice and within a reasonable time thereafter."

CONCLUSIONS OF LAW

A. That petitioner has shown that the adjustment in its sales tax accrual account in the amount of \$12,240.49 was warranted, and that such amount was not collected on behalf of the State, nor did it represent taxes due to the State. In addition, the Audit Division has conceded that petitioner made a payment of \$13,431.12 for the period ended November 30, 1977, thus cancelling its liability for that period. Since the sum of these adjustments exceeds the deficiency asserted, petitioner's tax liability for the period under consideration is cancelled.


B. That in view of Conclusion of Law "A", the remaining issue is rendered moot.

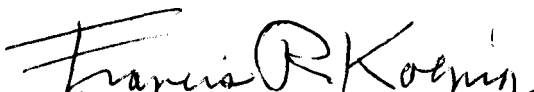
C. That the petition of On-Site Fuel Oil Co., Inc. is granted to the extent indicated in Conclusion of Law "A", and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 3, 1982 is cancelled.

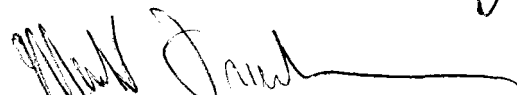
DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER