

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

J.A.L. OIL COMPANY, INC.

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 1, 1978
through May 31, 1981.

DECISION

In the Matter of the Petition

of

ALLAN R. GOLD,
OFFICER OF J.A.L. OIL COMPANY, INC.

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 1, 1978
through May 31, 1981.

Petitioner, J.A.L. Oil Company, Inc., 17 Barstow Road, Great Neck, New York 11021, 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 1, 1978 through May 31, 1981 (File No. 40656).

Petitioner, Allan R. Gold, Officer of J.A.L. Oil Company, Inc., 10 Fenimore Street, Lynbrook, New York 11563, 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 1, 1978 through May 31, 1981 (File No. 40657).

A consolidated hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Building 9, Room 107, W.A. Harriman Campus, Albany, New York on January 23, 1986 at 1:15 P.M. and continued before the same hearing officer at the same location on March 11, 1986 at 1:15 P.M.

and September 16, 1986 at 1:15 P.M., with all briefs to be submitted by February 3, 1987. Petitioners appeared by O'Connell & Aronowitz, P.C. (Fred B. Wander, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel at the hearing held on January 23, 1986 and Thomas Sacca, Esq., of counsel on the continued dates of March 11, 1986 and September 16, 1986).

ISSUES

I. Whether certain sales of gasoline made by J.A.L. Oil Co., Inc. to customers who did not furnish resale certificates were made for resale and thus not subject to tax.

II. Whether Allan R. Gold was a person required to collect tax on behalf of J.A.L. Oil Company, Inc.

FINDINGS OF FACT

1. Petitioner J.A.L. Oil Company, Inc. ("the corporation") was a distributor of Texaco gasoline during the period at issue.

2. The corporation was audited as part of an audit program involving the petroleum industry. Although the corporation's books and records were adequate and available, a test period audit was performed based on a consent executed by petitioner Allan R. Gold, as secretary of the corporation.

3. The test period used by the auditor was the quarter December 1, 1980 through February 28, 1981.

4. The corporation reported all sales for the test period as nontaxable. The records for the test period showed sales to 40 different customers. As the nontaxable status of sales to eight of the customers could not be substantiated by resale certificates, the auditor disallowed such sales, resulting in a

margin of error of 9.99%. This margin of error was applied to total sales for the audit period, resulting in additional taxable sales of \$2,045,608.00 and \$162,303.82 in additional sales tax due.

5. On September 20, 1982, the Audit Division issued the following notices of determination and demands for payment of sales and use taxes due:

- (a) J.A.L. Oil Company, Inc., total tax due \$162,303.82, plus total interest due \$58,333.40, for a total amount due of \$220,637.22 for the period June 1, 1978 through May 31, 1981.
- (b) Allan R. Gold, as Officer of J.A.L. Oil Company, Inc., total tax due \$162,303.82, plus total interest due \$58,333.40, for a total amount due of \$220,637.22 for the period June 1, 1978 through May 31, 1981.

6. The corporation was founded by Jacob A. Leibowitz more than 50 years ago as a distributorship for Texaco gasoline. Shortly after Mr. Leibowitz's death, in or about 1975, his widow, Bessie Leibowitz, became president and sole shareholder of the corporation. Mrs. Leibowitz, an elderly woman, was president and sole shareholder during the period at issue, but did not manage the day to day affairs of the corporation. However, she did make decisions as to expenditures of funds, the financing of corporate ventures and other matters.

7. During the audit period, the business was managed by Allan R. Gold, Mrs. Leibowitz's nephew, who had been with the corporation since 1946. Mr. Gold was secretary of the corporation. He signed tax returns and most checks on behalf of the corporation during the period at issue. Mrs. Leibowitz signed some checks from time to time.

8. In addition to Mr. Gold and Mrs. Leibowitz, the business employed a bookkeeper, a secretary and two salesmen.

9. The business of the corporation operated in this manner: its customers, operators of retail gasoline stations, would call the corporation's offices and order a quantity of Texaco gasoline. The corporation would then call in the order to Texaco and delivery to the stations would be made the following day by Texaco. Texaco billed the corporation for the gasoline purchased for each location. A copy of the bill was given to the dealer by the Texaco truck driver at the time of the delivery. The dealer paid the bill and the driver collected checks and credit card slips which were credited to the corporation's account.

10. The eight customers for which the corporation could not produce resale certificates were as follows:

- (a) Morgwat Garage Ltd., 112-45 Springfield Boulevard,
Queens Village, New York 11428
- (b) Restoration Service Station, Inc., 1450 Atlantic
Avenue, Brooklyn, New York 11216
- (c) Daton Service Center, Inc., 4102 Avenue H, Brooklyn,
New York 11210
- (d) King's Service Station, 5714 Old Sunrise Highway,
Massapequa, New York 11758
- (e) A. Levy Service Center, Inc. (a/k/a Nevoc), 2015 Bath
Avenue, Brooklyn, New York 11214
- (f) Rapid Garage, 78-20 Northern Boulevard, Jackson
Heights, New York
- (g) Riga Service Station (a/k/a Z & M Service Center), 28
Sunrise Center, 1401 Central Avenue, Far Rockaway, New
York 11691
- (h) Woodstone Service Station, 6901 Woodhaven Boulevard,
Rego Park, New York 11375

Petitioner showed, through documentary and testimonial evidence, that the above were retail gasoline stations which, in fact, also operated automobile repair

shops. The stations purchased, on the average, nearly 10,000 gallons of gasoline per month from petitioner.

11. Sales made to the aforementioned eight gasoline stations were made by the corporation at the then current wholesale prices.

CONCLUSIONS OF LAW

A. That during the period at issue, Tax Law § 1132(c) provided that all receipts for the type of property at issue herein were presumed to be subject to tax unless the contrary was established and the burden of proving that the receipt was not taxable was on the person required to collect tax, or the customer. Where the vendor obtained a properly completed resale or exemption certificate, the burden of proving that the receipt was not taxable was solely on the customer.¹

B. That although such sales without resale certificates were presumed to be taxable, this presumption was rebuttable and could be overcome by a vendor sustaining his burden of proof to show that the sales were made for resale.

(~~See~~ Matter of Ruemil Contract Interiors, Inc., State Tax Commission, September 9, 1983.)

C. That petitioner J.A.L. Oil Company, Inc. sustained its burden of proof to show that the sales made to the eight customers which did not supply resale certificates were sales for resale and thus not taxable under Tax Law § 1105(a). Petitioner was strictly a wholesaler of gasoline and the eight customers at issue were gasoline stations with repair facilities, which resold the gasoline

¹ Tax Law § 1132(c) was amended effective September 1, 1985, to provide, in part, that the resale or exemption certificate must be received by the vendor "not later than ninety days after delivery of the property".

at retail to the general public. Moreover, the large volume of gasoline purchased per month by the stations indicates that the purchases were not for ultimate consumption by the stations.

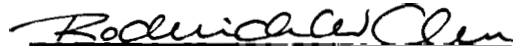
D. That in view of Conclusion of Law "C", Issue "II" is moot.

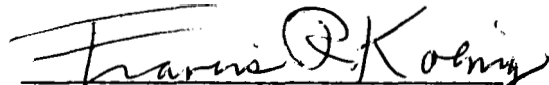
E. That the petitions of J.A.L. Oil Company, Inc. and Allan R. Gold are granted and the notices of determination and demands for payment of sales and use taxes due issued September 20, 1982 are cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 9 1987


PRESIDENT


COMMISSIONER


COMMISSIONER