

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

HEATER TRUCKING, 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 March 1, 1977  
through November 30, 1981.

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Petitioner, Heater Trucking, Inc., 505 Como Park Boulevard, Cheektowaga, New York 14225, 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 March 1, 1977 through November 30, 1981 (File No. 55317).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on January 8, 1987 at 1:15 P.M. Petitioner appeared by Donald E. Heater, President. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

#### ISSUE

Whether the Audit Division's imposition of tax upon certain purchases of diesel fuel made by petitioner was proper.

#### FINDINGS OF FACT

1. On June 27, 1984, following an audit, the Audit Division issued to petitioner, Heater Trucking, Inc., two notices of determination and demands for payment of sales and use taxes due asserting \$10,599.10 in tax, plus interest of \$5,981.65 for a total amount due of \$16,580.75 for the period March 1, 1977 through November 30, 1981.

2. Petitioner is and was at all times relevant herein a common carrier providing long-distance transportation services. Petitioner was not a registered vendor for sales tax purposes during the period at issue, and did not file sales tax returns during that period.

3. The tax assessed herein was premised upon the Audit Division's assertion that petitioner had failed to pay sales tax upon its purchases of diesel fuel from William A. Evans ("Evans"), a fuel distributor. The Audit Division therefore asserted tax due from petitioner based upon the amount of petitioner's purchases from Evans. The Audit Division examined petitioner's purchase invoices and check disbursements journals in detail with respect to petitioner's purchases from Evans. The invoices gave no indication that sales tax had been paid, listing only a balance due and number of gallons purchased. The Audit Division totalled the payments made to Evans during the audit period and assessed tax based upon that amount.

4. Petitioner purchased most of its fuel in bulk from William A. Evans during the audit period. Evans generally delivered fuel to petitioner's premises and deposited it in a fuel tank located thereon. Of 75 disbursements made by petitioner during the audit period to Evans, 69 were greater than \$1,000.00 and, of the remaining disbursements, none were less than \$400.00.

5. Petitioner also made purchases directly from Evans' pumps. At hearing, the Audit Division adjusted the amount of tax asserted due herein by \$17.85, to \$10,581.25, to reflect purchases made directly from the pumps and upon which sales tax had been paid.

6. At various times during the audit period, Evans requested that petitioner execute a resale certificate and return it to Evans. Petitioner did not complete any such certificate.

7. Petitioner believed that sales tax was included in the purchase price it had paid for the fuel purchased during the audit period, but, aside from a small amount (as referred to in Finding of Fact "5"), it could not produce any documentation to substantiate this belief. Petitioner contended that William A. Evans should properly be held responsible for the tax at issue herein, inasmuch as Evans had been required by law to collect the tax and had purportedly failed to do so.

#### CONCLUSIONS OF LAW

A. That section 1133(b) of the Tax Law provides the following with respect to taxes imposed pursuant to Article 28:

"Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid."

B. That petitioner has failed to establish that it paid sales tax on its purchases of diesel fuel from William A. Evans at the time of purchase. In this regard, it is noted that petitioner introduced no documentation at hearing tending to prove that such tax had been paid to Evans; indeed, petitioner conceded that it did not know whether tax had been paid, but only that it believed that tax had been included in the purchase price of the fuel. Accordingly, petitioner is liable for payment of the tax asserted due herein pursuant to section 1133(b) of the Tax Law.

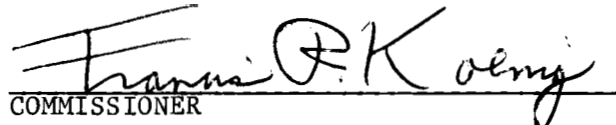
C. That the petition of Heater Trucking, Inc. is in all respects denied and the notices of determination and demands for payment of sales and use taxes due, dated June 27, 1984, as adjusted (Finding of Fact "5"), are sustained.

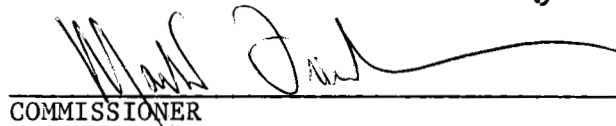
DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT

  
COMMISSIONER

  
COMMISSIONER