

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

CANON PETROLEUM CORP.

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, 1980 :
through December 31, 1980.

Petitioner, Canon Petroleum Corp., c/o Bonnie Weiss, 2 Bond Street, New York, New York 10012, 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, 1980 through December 31, 1980 (File No. 60046).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 29, 1986 at 9:30 A.M., with all briefs to be filed by March 31, 1987. Petitioner appeared by Peter R. Newman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner made a timely claim for refund or credit under Tax Law § 1139(a).

FINDINGS OF FACT

1. Prior to June 11, 1980, petitioner, Canon Petroleum Corp. ("Canon") operated a heating oil sales and oil burner service business, while a sister corporation, Haco Mechanical Corp. ("Haco") operated an air conditioning business. Both businesses were operated in the City of New York.

2. On June 11, 1980, Haco Canon Corp. ("Haco Canon") was formed and assumed the business operations of both Canon and Haco. The reason for this

restructuring was to eliminate the need for two separate entities for what was essentially one business. Canon and Haco did business with many of the same customers and although separate bills were issued, customers would frequently pay the wrong corporation or write one check to both corporations, e.g., "Haco Canon".

3. Petitioner's former accountant reported all sales on one sales tax return for each period after Haco Canon was formed. The returns, however, were filed on whatever pre-labeled forms the accountant had available and, as a result, the returns were filed under three different names and under several different identification numbers.

4. A part-quarterly sales tax return of Canon for the period December 1, 1980 through December 31, 1980, dated January 15, 1981, was filed on or about May 19, 1981, showing sales and use tax due of \$11,896.00. The tax due was paid with the return.

5. A quarterly sales tax return of Haco Canon for the quarter December 1, 1980, through February 28, 1981, was filed by Haco Canon showing sales and use tax due of \$38,449.57. The tax was paid on or about July 15, 1981, but the date of the filing of the return is not clear.

6. On or about February 3, 1982, Haco Canon paid \$4,468.92 in penalty and interest for the quarter ending February 28, 1981.

7. On March 16, 1983, a principal clerk in the Delinquency Compliance Unit, Sales Tax, in Albany wrote to Bonnie Weiss, vice-president of Haco Canon Corp., stating, in pertinent part, as follows:

"Enclosed are the returns we spoke of Friday. Please review your figures for all these periods even the ones previously filed. Before I process these returns I will review our records and verify that all payments were applied to the proper periods. I will also correct our records should you find figures you wish to amend. It

would be very helpful if you noted the deposit serial number for each payment by period.

Please have your reply post-marked within 20 days and send this information directly to my attention. This will safeguard against duplicate returns being erroneously filed."

It is not clear from the record which returns were enclosed.

8. The record shows that the Tax Compliance Bureau commenced collection activity against petitioner on January 7, 1983, apparently in connection with an assessment issued on August 15, 1979, for the period December 1, 1978. through February 28, 1979 and payments were in fact made by petitioner to the Tax Compliance Bureau on this assessment during 1983.

9. The tax compliance agent's contact sheet shows that on December 20, 1983, he received a telephone call from petitioner stating that the business had been merged and had become Haco Canon on June 12, 1980. Petitioner, according to the contact sheet, was to send in cancelled checks "for research of application".

10. On February 7, 1984, the tax compliance agent called petitioner's present accountant who stated he would send or bring in petitioner's cancelled checks. An appointment was made for February 23, 1984 for the accountant to bring in copies of said checks for research and review.

11. On February 23, 1984, the accountant met with the tax compliance agent and produced the cancelled checks. At the meeting, the agent and the accountant agreed that because of the different identification numbers and names, all payments were to be put into one group reconstruction and that the overpayments for December 1980 were to be applied to the liabilities for other periods and whatever balance remained would be paid by Haco Canon. The tax compliance agent suggested that the accountant file an amended return showing no tax due by Canon for the month of December 1980. The accountant apparently

prepared the return at the conference and gave the agent the amended return which was sent by the agent to the sales tax unit in Albany marked as a "Protest".

12. Petitioner was never credited with the \$11,896.00 paid with the return for the part-quarterly period of December 1980 and filed an Application for Credit or Refund of State and Local Sales and Use Tax for said amount dated August 1, 1984. The application was received by the Sales Tax Refund Unit on August 17, 1984.

13. The claim for refund was denied by the Central Sales Tax Section by letter dated March 18, 1985, on the basis that the three year statute of limitations for filing a refund claim had expired.

14. The tax compliance agent's contact sheet shows that there were numerous assessments issued against either Canon, Haco or Haco Canon for 1978 through 1982 and also for subsequent years. In fact, collection activity on these assessments appears to have taken place from January 1983 until shortly prior to the hearing in 1986.

CONCLUSIONS OF LAW

A. That Tax Law § 1139(a) provides that an application for refund or credit must be filed:

"(ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article.... Such application shall be in such form as the tax commission shall prescribe."

B. That Tax Law § 1137(a) provides that sales and use tax is to be paid at the time of the filing of the tax return.

C. That Tax Law § 1136(b) provides, in pertinent part, as follows:

"(b) The returns... required by this section to be filed quarterly shall be filed for quarterly periods ending on the last day of February, May, August and November of each year, and each return... shall be filed within twenty days

after the end of the quarterly period covered thereby. The returns required by this section to be filed monthly shall be filed for monthly periods ending on the last day of each month and each return shall be filed within twenty days after the end of each prior month."


D. That even assuming that the request of petitioner's accountant to apply the excess payments from its December 1980 return to accounts of its sister corporations and the filing of the amended return showing no tax due for said quarter constituted a claim for refund, said actions took place in February 1984 and could not constitute a timely claim. Petitioner's December 1980 return was due on January 20, 1981, as was payment of the tax due thereon. Accordingly, any claim would have to have been made by January 20, 1984. Petitioner clearly was trying to resolve the discrepancies as early as March 1983 (see Finding of Fact "7") and in fact, on December 20, 1983, was told to send in cancelled checks so that application of the checks could be traced. While these activities led up to the filing of a claim for refund, they did not, per se, constitute a claim for refund.

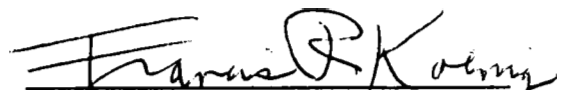
E. That the petition of Canon Petroleum Corp. is denied and the denial of refund issued by the Audit Division on March 18, 1985 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987


PRESIDENT


COMMISSIONER


COMMISSIONER